LEXSEE 1999 U.S. DIST. LEXIS 19409

PECO ENERGY COMPANY v. TOWNSHIP OF HAVERFORD

CIVIL ACTION NO. 99-4766

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1999 U.S. Dist. LEXIS 19409

December 20, 1999, Decided
December 20, 1999, Filed

DISPOSITION: {*1} Plaintiff's motion for summary judgment GRANTED. Defendant's motion for summary judgment DENIED. JUDGMENT ENTERED in favor of plaintiff PECO Energy Co. and against defendant Township of Haverford Defendant's Ordinance No 10-99 declared NULL AND VOID, and defendant ENJOINED from enforcing the Ordinance against plaintiff. Case CLOSED.

CASE SUMMARY:

PROCEDURAL POSTURE: The matter was before the court on cross summary judgment motions by plaintiff energy company and defendant township in plaintiff's declaratory and injunctive relief action regarding the validity of Haverford Township, Pennsylvania Ordinance No 10-99 under, inter alia, the Telecommunications Act of 1996, *47 USCS § 151* et seq.

OVERVIEW: Plaintiff contracted to provide fiber optic cable links to school districts. Portions of the system were to be installed on utility poles already maintained on plaintiff's rights-of-way within defendant township. After defendant ordered plaintiff to stop construction until it obtained permits required under Haverford Township, Pennsylvania, Ordinance No. 10-99 (ordinance), plaintiff filed for declaratory and injunctive relief, alleging the ordinance was preempted by and invalid under the Telecommunications Act of 1996, *47 U.S.C.S. § 151* et seq. ("TCA"), inter alia. The court held that because the ordinance was so broad and vague, it was not entitled to "safe harbor" protection under TCA § 253 It failed to limit defendant's discretion to matters involving physical use and occupation of the public rights-of-way as required by the TCA, and imposed fees but did not state amounts, calculation methods, or their relation to public rights-of-way use The ordinance was invalid under the TCA.

OUTCOME: Plaintiff's summary judgment motion granted, defendant's summary judgment motion denied, ordinance declared null and void, and defendant enjoined from enforcing its ordinance against plaintiff as it was invalid under federal telecommunications law.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Supporting Papers & AffidavitsCivil Procedure > Summary Judgment > Summary Judgment Standard
[HN1] Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN2] On motion for summary judgment, the moving party bears the burden of proving that there is no genuine issue of material fact in dispute.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN3] On motion for summary judgment, the court views all evidence in the light most favorable to the nonmoving party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN4] When responding to a motion for summary judgment, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Constitutional Law > The Judiciary > Case or Controversy
[HN5] U.S. Const. art. III, § 2 limits the jurisdiction of the federal courts to actual cases and controversies. The case and controversy requirement ensures that the federal courts do not issue advisory opinions.

Constitutional Law > The Judiciary > Case or Controversy
[HN6] To satisfy the case and controversy requirement of U.S. Const. Art. III, § 2, an action must present: (1) A legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy so as to sharpen the issues for judicial resolution.

Constitutional Law > The Judiciary > Case or Controversy
[HN7] The U.S. Const. Art. III, § 2 case or controversy requirement must be met even when the plaintiff is seeking declaratory relief.

Constitutional Law > The Judiciary > Case or Controversy
[HN8] The difference between an abstract question and a controversy contemplated by the Declaratory Judgement Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN9] The "ripeness" doctrine is part of U.S. Const. Art. III's case and controversy requirement and determines when a party may bring an action

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN10] Generally, a court determines if a matter is ripe for adjudication by looking to the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Civil Procedure > Remedies > Declaratory Relief
[HN11] In the declaratory judgment context, the Third Circuit Court of Appeals uses a three-part test to determine if a matter is ripe. The court focuses on the adversity of interest between the parties, the conclusivity that a declaratory judgment would have on the legal relationship between the parties, and the practical help, or utility of a declaratory judgment.

Civil Procedure > Remedies > Declaratory Relief
[HN12] A plaintiff need not suffer a completed harm to establish adversity of interest in the context of declaratory relief. In some situations, present harms will flow from the threat of future actions. Thus, to the extent that the parties' adversity of interest is contingent on future events, the threat of future harm is sufficiently real and immediate to satisfy this requirement.

Civil Procedure > State & Federal Interrelationships > Abstention

[HN13] When a federal court is presented with both a federal constitutional question and an unsettled issue of state law, and the resolution of the state-law issue could narrow or eliminate the federal constitutional question, the federal court may be justified in abstaining under principles of comity to avoid needless friction with state policies.

Civil Procedure > State & Federal Interrelationships > Abstention
[HN14] A federal court should not abstain under Pullman from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a nonconstitutional process of statutory construction.

Civil Procedure > State & Federal Interrelationships > Abstention
[HN15] Burford abstention applies when a federal court is asked to enjoin a state administrative order that will injure the plaintiff.

Communications Law > Federal Acts > Telecommunications Act
[HN16] The purpose of the Telecommunications Act of 1996, *47 U.S.C.S. § 151* et seq. is to decrease regulation and increase competition in the telecommunications industry. To this effect, it imposes significant limitations on the authority of state and local governments to regulate the industry

Communications Law > Federal Acts > Telecommunications Act
[HN17] The Telecommunications Act of 1996, *47 U.S.C.S. § 253*, entitled "Removal of barriers to entry, provides in subsection (a) that no state or local statute or regulation, or other State or local legal requirement, may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Communications Law > Federal Acts > Telecommunications Act
[HN18] The Telecommunications Act, *47 U S C.S. § 253*(c) provides a safe harbor for state and local governments.

Communications Law > Federal Acts > Telecommunications Act
[HN19] See *47 U S C S. § 253*(c).

Communications Law > Federal Acts > Telecommunications Act
[HN20] All of the permissible state or local government authority allowed under the Telecommunications Act, *47 U.S.C S § 253* "safe harbor" provision relates to the physical use and occupation of the public rights-of-way.

Communications Law > Federal Acts > Telecommunications Act
[HN21] Under the Telecommunications Act, *47 U.S C.S. § 253*(c), a local government may demand compensation from telecommunications providers for their use of the public rights-of-way. Any fee, however, must be directly related to the company's use of the right-of-way.

Communications Law > Federal Acts > Telecommunications Act
[HN22] Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way as contemplated under the Telecommunications Act, *47 U.S.C S. § 253*

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For TOWNSHIP OF HAVERFORD, DELAWARE COUNTY, DEFENDANT: JOHN F. NOBLE, WASHINGTON, DC USA. GILBERT L. HAMBERG, GILBERT L. HAMBERG, ESQ., YARDLEY, PA USA. NICHOLAS F. MILLER, WILLIAM MALONE, MARCI L. FRISCHKORN, MILLER & VAN EATON, P.L.L.C., WASHINGTON, DC USA.

JUDGES: Stewart Dalzell, J.

OPINIONBY: STEWART DALZELL

OPINION: MEMORANDUM

Dalzell, J.

December 20, 1999

This case presents the problem of balancing the authority of a local government to regulate within its borders against the right of a telecommunications provider to install its fiber optic cables in a community without undue interference from the community's officials. Currently before us are the parties' cross-motions for summary judgment. For the reasons that follow, we will [*2] grant PECO's motion and deny Haverford Township's motion. n1

n1 Haverford has requested oral argument. Because we have determined that oral argument will not assist us in our determination of this matter, we will decide it based on the parties' briefs.

Facts

The parties agree on most of the basic facts. On February 1, 1999, PECO, through its Exelon Infrastructure Service Division, entered into a contract with the Delaware County Intermediate Unit ("DCIU") to provide twelve-strand fiber optic cable to link various Delaware County school districts for data, voice, and video communications (the "Project"). See Stip. of Undisputed Facts P 4. Under the contract, PECO was to own the fiber optic cable and provide a right of use to the DCIU. The system also has the capacity to serve customers other than the DCIU. See id. PP 5-7.

The Project includes a "buildout" in Haverford to link the Haverford School District to the telecommunications system. As part of this buildout, portions of the fiber optic [*3] cables were to be installed on rights-of-way--specifically, on utility poles that PECO has maintained for years--that Haverford Township controls. See id. P 11. On June 1, 1999, PECO began attaching the fiber optic cables to the utility poles.

On June 25, 1999, Thomas J. Banner, Haverford's Township Manager/Secretary, sent PECO a letter ordering it to "cease and desist" its construction activities until it had obtained the requisite permits. n2 On July 16, 1999, Banner sent a letter to Exelon advising it that, on July 12, 1999, n3 Haverford had adopted Ordinance No. 10-99 (the "Ordinance"), which provides, in part, that "no person shall install, erect, hang, lay, bury, draw, emplace, construct, or reconstruct any communications facility upon, across, beneath, or over any public right-of-way . . . without first entering into a franchise agreement, license agreement, or lease " The letter advised Exelon that, before it could resume construction on the Project, it would have to obtain the appropriate authorizations from Haverford Township It also stated that "failure to cease and desist from further construction activities will subject you and/or your contractors to the imposition [*4] of . . . penalties " n4 PECO stopped its construction on the Project when it received the July 16 letter.

n2 Banner's June 25, 1999 letter stated, in part, that:

> Before Exelon . . . may enter upon any Township right-of-way to resume construction activities, it must obtain the appropriate authorization from the Township. Until such time as Exelon obtains the appropriate authorizations from the Township, Exelon must cease and desist its construction activities in the Township's rights-of-way.

Compl. Ex. B

n3 Contrary to Banner's letter, however, Haverford Township did not actually enact the Ordinance until three months later, i.e., October 12, 1999.

n4 The "penalties" Banner spoke of are quite severe. They include fines of $ 1000 per day and imprisonment for not more than thirty days.

On September 24, 1999, PECO filed this action for declaratory and injunctive relief, alleging that the Ordinance is preempted by and invalid under the Telecommunications Act of 1996, *47 U.S.C. § 151* [*5] et seq. ("TCA"), the Supremacy Clause of the United States Constitution, *42 U.S.C. § 1983*, and Pennsylvania law. Along with its complaint, PECO also filed a motion for a preliminary injunction, but, after a Rule 16 conference on October 4, agreed to withdraw the motion The parties agreed to resolve this matter on cross-motions for summary judgment n5

n5 [HN1] Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [HN2] The moving party bears the burden of proving that there is no genuine issue of material fact in dispute, see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986),* [HN3] and we view all evidence in the light most favorable to the nonmoving party, see *id. at 587.* [HN4] When responding to a motion for summary judgment, the nonmoving party "must come forward with specific facts showing there is a genuine issue for trial." Id.; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S Ct. 2548 (1986)* (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

Haverford has styled its motion as one to dismiss pursuant to *Fed R. Civ. P. 12(b)(1)* and (6) or, in the alternative, for summary judgment. Because we are looking at matters beyond the pleadings, and because we reject its argument that this matter should be dismissed for lack of subject matter jurisdiction, we will treat Haverford's motion as one for summary judgment.

[*6]

The Ordinance

PECO has asked us to declare the Ordinance invalid and unenforceable under federal and state law. It also has asked us to permanently enjoin Haverford from seeking to enforce the Ordinance against it.

Ordinance 10-99 prohibits telecommunications providers from constructing telecommunications facilities in the public rights-of-way without first obtaining a franchise or license agreement from Haverford Township. It provides that the Township "may grant one or more franchises," Pl.'s Mot. for Summ. J. Ex. C (Ord. 10-99, § 3A) and states that the Township Manager shall "negotiate all franchise and license agreements in accordance with the terms and procedures specified in this ordinance." Id. (§ 5(A)(4)). No "terms and procedures" are specified in the Ordinance.

The Ordinance mentions four different fees to be imposed on telecommunications providers but does not specify the amount or (with one exception) the purpose of those fees. It requires (1) application and hearing fees; (2) annual fees for all cable, "OVS" (an undefined term), or telecommunications service providers occupying public rights-of-way; (3) annual per-lineal-foot fees from communications **[*7]** service providers; and (4) franchise and license fees. See id. § 5(A) Haverford has not published a schedule of any of these fees

A violation of the Ordinance can result in harsh penalties It provides that any person, firm or corporation who violates it shall

> Pay a fine not exceeding $ 1000 and costs of prosecution; and in default of one payment of the fine and costs, the violator may be sentenced to the county jail for a term of not more than 30 days. Each and every day in which any person, firm or corporation shall be in violation of [the Ordinance] shall constitute a separate offense.

Id. § 6(A) The Ordinance also provides for the forfeiture of any facility in violation:

> Any communications facility constructed, maintained, or operated upon, across, beneath, or over any public right-of-way in this Township . . . in violation of this ordinance, including default as timely payment of annual fees or any franchise or license fee due hereunder, is hereby declared to be subject to forfeiture; and the Township . . . may seize, disable, remove, or destroy such facility upon thirty days' advance notice in writing to the owner or operator thereof. **[*8]** . . .

Id. § 6(B).

Threshold Matters

1. Ripeness

Haverford raises several preliminary arguments in its motion. First, it argues that we should dismiss this matter for lack of jurisdiction, or should decline to exercise our jurisdiction over this case, because the matter allegedly is not yet "ripe" since PECO has not to date applied for a franchise under the Ordinance.

[HN5] Article III of our Constitution limits the jurisdiction of the federal courts to actual "cases" and "controversies." U.S. Const. art. III, § 2. The "case and controversy" requirement ensures that the federal courts do not issue advisory opinions. See, e.g., *Flast v. Cohen, 392 U.S. 83, 96, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).*

[HN6] To satisfy the case and controversy requirement, an action must present:

> (1) [A] legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy so as to sharpen the issues for judicial resolution.

Armstrong World Indus. v. Adams, 961 F.2d 405, 410 (3d Cir. 1992); **[*9]** see also *City of Los Angeles v. Lyons, 461 U.S. 95, 101-05, 75 L Ed 2d 675, 103 S Ct. 1660 (1983).*

[HN7] This case or controversy requirement must be met even when the plaintiff is seeking declaratory relief. In *Maryland Casualty Co. v. Pacific Coal & Oil Co , 312 U.S. 270, 273, 85 L Ed 826, 61 S. Ct. 510 (1941),* our Supreme Court held that:

> [HN8]
> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgement Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Id. (footnote omitted).

[HN9] The "ripeness" doctrine is part of Article III's case and controversy requirement and determines when a party may bring an action. "Its basic rationale is to prevent the courts, through avoidance of premature adjudication, **[*10]** from entangling themselves in abstract disagreements." *Abbott Labs v. Gardner, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S Ct. 1507 (1967),* overruled on other grounds, *430 U.S. 99, 104 (1977)*

[HN10] Generally, a court determines if a matter is ripe for adjudication by looking to "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id at 149* [HN11] In the declaratory judgment context, our Court of Appeals has given us a three-part test to determine if a matter is ripe. We are to focus on the "adversity of interest" between the parties, the "conclusivity" that a declaratory judgment would have on the legal relationship between the parties, and the "practical help, or utility" of a declaratory judgment. *Armstrong, 961 F.2d at 411;* see also *Step-Saver Data Sys., Inc. v Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990).*

Applying these factors here, it is clear that this matter is ripe for adjudication. There is a palpable adverse interest between the parties, as PECO is claiming real world harm based on the very existence of the Ordinance. [HN12] Furthermore, **[*11]** our Court of Appeals had held that "a plaintiff need not suffer a completed harm to establish adversity of interest . . . . In some situations, present harms will flow from the threat of future actions." *Armstrong, 961 F 2d at 412.* Thus, to the extent that the parties' adversity of interest is contingent on future events, we hold that the threat of future harm is sufficiently real and immediate to satisfy this requirement. n6

> n6 Also, Haverford through its Township Manager has already ordered PECO to "cease and desist" its construction on the Project, further demonstrating the parties' adversity of interest and the immediacy of PECO's actual injury.

With respect to the second factor, there is no doubt that the issuance of a declaratory judgment would provide relief of a conclusive nature, and would not merely be "an opinion advising what the law would be upon a hypothetical state of facts." *Step-Saver, 912 F.2d at 649* (quotations omitted). There is nothing "hypothetical" about **[*12]** this Ordinance.

And the third factor--the practical help, or utility, of a declaratory judgment--is satisfied here. Without a declaratory judgment, PECO would be forced to comply with an allegedly invalid ordinance, risk heavy penalties, or fail to perform its contract with the DCIU.

Also, with respect to the "general" ripeness factors, we find that this matter is fit for judicial decision, since PECO is challenging the very existence of the Ordinance. The Ordinance has been enacted, PECO is subject to it, and the complete text of it is before us. No purpose would be served by our refraining from deciding this matter, other than forcing PECO to choose between the unpleasant alternatives noted above. Similarly, the hardship of withholding court consideration is blatantly obvious, as it is likely to land PECO (or its representatives) in debt, in jail, or at the defense table in the DCIU's breach of contract suit.

We therefore hold that this matter is ripe for adjudication. This decision conforms with what other courts have held. In *AT&T Communications v. City of Austin, 975 F. Supp. 928, 937-38 (W.D Tex. 1997),* the district court, in a nearly identical factual **[*13]** situation, held that

> This case is ripe for adjudication. . . . It is the existence of the Ordinance itself that gives rise to the plaintiff's claims. Furthermore, a determination of AT & T's claims simply requires an examination of the Ordinance in light of federal and state law; no further factual development is required. Finally, the harm to AT & T in this case is present and real. It goes without saying that delayed entry into the local telephone service market can have profound effects on the success of AT & T's venture . . . Considering the Ordinance's threat of criminal penalties and fines, AT & T was left with the Hobson's choice of either applying for a municipal consent or challenging the Ordinance in an appropriate forum. In short, AT & T's failure to apply for a municipal consent is irrelevant to the merits of this case, and the plaintiff should be delayed no more in its ability to seek relief under the Act.

See also *AT & T Communications v City of Dallas, 8 F. Supp. 2d 582, 595 (N D. Tex 1998)* (holding, in a similar situation, that "it is not necessary for AT & T to expose itself to [criminal penalties] to be entitled to challenge **[*14]** the City's requirements. It is also not necessary . . . for AT & T to comply with the city's onerous, and potentially illegal franchise requirements as it awaits a decision on the merits of its claim.").

2. Abstention

Haverford also argues that we should abstain from deciding this case under *Railroad Comm'n of Texas v. Pullman Co , 312 U.S 496, 85 L. Ed 971, 61 S Ct. 643 (1974)* and *Burford v. Sun Oil Co., 319 U.S. 315, 87 L Ed 1424, 63 S Ct. 1098 (1943)* We disagree.

a. Pullman Abstention

[HN13] In Pullman, the Supreme Court held that when a federal court is presented with both a federal constitutional question and an unsettled issue of state law, and the resolution of the state-law issue could narrow or eliminate the federal constitutional question, the federal court may be justified in abstaining under principles of comity to avoid "needless friction with state policies." *Pullman, 312 U.S. at 500.*

[HN14] In *United Servs Auto Ass'n v Muir, 792 F.2d 356, 363 (3d Cir. 1986),* our Court of Appeals held that "a federal court should not abstain under Pullman from interpreting a state law that might be **[*15]** preempted by a federal law, because preemption problems are resolved through a nonconstitutional process of statutory construction." See also 17A Wright, Miller, & Cooper, Federal Practice and Procedure § 4242, at 33-34 (2d ed. 1988) (stating that Pullman abstention is inappropriate in a Supremacy Clause case).

Because PECO argues that the TCA preempts the Ordinance, we find that Pullman abstention is inappropriate here. See also *City of Austin, 975 F. Supp. at 940* (refusing to abstain under Pullman in a nearly identical matter).

b. Burford Abstention

[HN15] Burford abstention applies when a federal court is asked to enjoin a state administrative order that will injure the plaintiff. See, e.g , *New Orleans Pub Serv. Inc v Council of New Orleans, 491 U.S 350, 361, 105 L Ed. 2d 298, 109 S Ct 2506 (1989), Keeley v Loomis Fargo & Co , 183 F 3d 257, 273 n.13 (3d Cir. 1999)*

As there are no state administrative orders at issue here, and because the Ordinance is one of general applicability, abstention under Burford is inappropriate. See, e g., *Keeley, 183 F.3d at 273 n.13* (stating **[*16]** that "cases implicating

Burford abstention involve state orders against an individual party that a federal-court plaintiff seeks to enjoin" and holding that a state regulation applicable to all trucking industry employers did not make Burford abstention appropriate).

The TCA

Having disposed of all of Haverford's preliminary matters, we can now address the validity of the Ordinance under the TCA. n7

> n7 Haverford argues that the TCA is inapplicable here because "PECO is not engaged in the provision of telecommunications service within the meaning of [the TCA]." Def.'s Br. at 32. It argues that, because PECO's contract with the DCIU provides that PECO is merely responsible for providing the infrastructure--in other words, the cable by itself--it is not engaged in providing telecommunications service." Because Haverford has not pointed us to any authority holding that the TCA is inapplicable in this situation, we reject its hypertechnical argument as devoid of merit.

[HN16] On February 8, 1996, Congress [*17] adopted the TCA, *47 U.S.C. § 151* et seq. Its purpose is to decrease regulation and increase competition in the telecommunications industry. To this effect, it imposes significant limitations on the authority of state and local governments to regulate the industry. See, e.g., *Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 2337-38, 138 L. Ed. 2d 874 (1997)* (stating that the TCA's "primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunications technologies" (internal quotation omitted)); *Paging, Inc. v. Board of Zoning Appeals, 957 F. Supp. 805, 807 (W.D. Va. 1997)* ("Congress passed the [TCA] in order to provide a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition" (internal quotation omitted)).

[HN17] To foster this deregulatory, procompetitive atmosphere, § 253 of the TCA, entitled "Removal of barriers to entry," provides in subsection (a) that "no state or local statute or regulation, [*18] or other State or local legal requirement, may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [HN18] *47 U.S.C. § 253*(c) provides a "safe harbor" for state and local governments. This subsection provides that:

> [HN19]
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government

1. The Ordinance is Not Entitled to "Safe Harbor" Protection

Haverford argues that the Ordinance is concerned only with regulating the public rights-of-way and therefore falls completely within the safe harbor of § 253(c). Because the Ordinance is so broad and vague, however, we find that it is not entitled to safe harbor protection.

The Federal Communications Commission, which is the federal agency charged with implementing the TCA, has offered interpretations of this provision [*19] of the 1996 statute. In *In re Classic Telephone, Inc., 11 FCC Rcd 13082 (F.C.C. 1996)*, the FCC, quoting from the congressional testimony of Senator Diane Feinstein, offered examples of the types of restrictions that Congress intended to permit under § 253(c). These include:

> Regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;
>
> Requiring a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;
>
> Requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations;

Enforcing local zoning regulations, [and]

Requiring a company to indemnify the city against any claims of injury arising from the company's excavation.

Id. [HN20] Thus, all of this permissible state or local government authority relates to the physical use and occupation of the public rights-of-way.

We find that the Ordinance, as it currently reads, is not limited to matters involving the mere regulation of the public rights-of-way, **[*20]** for several reasons. First, it gives the Township Manager total discretion in deciding whether to grant or deny a franchise, without providing any guidelines for how that decision should be made. Also, the Ordinance fails to disclose the required compensation and fees, or even the basis for calculating and imposing those fees.

This apparently limitless discretion of the Township Manager to grant or deny a franchise places the Ordinance outside the ambit of the TCA's safe harbor. Given the purpose behind the TCA--the deregulation of the telecommunications industry--and the very specific nature of the authority preserved to state and local governments in the safe harbor provision, we find that the breadth and vagueness of the Ordinance renders it invalid. There is nothing in the Ordinance that limits the discretion of the Township Manager to matters involving the physical use and occupation of the public rights-of-way. Also, because the Ordinance does not specify how a telecommunications provider is to apply for a franchise or what the contents of such an application should be, we (as well as any provider who wishes to obtain a franchise) cannot discern whether the Township will look **[*21]** only at matters involving the public rights-of-way or other factors impermissible under the TCA.

In so holding, we agree with the district court in *Bell Atlantic-Maryland v. Prince George's County, 49 F. Supp. 2d 805, 815-17 (D. Md. 1999)* In Prince George's County, the Court, in striking down a local ordinance similar to the one at issue here, held that "most objectionable is the fact that the ordinance vests the County with complete discretion to grant or deny a franchise application . . . . The ordinance provides no criteria to guide the county executive in carrying out his or her responsibility to negotiate franchise agreements." Based on this apparently unfettered discretion, the Court concluded that the ordinance was not entitled to safe harbor protection. See also *City of Dallas, 8 F. Supp 2d at 592-93* (holding that a local government's complete discretion to grant or deny a franchise placed an ordinance outside the safe harbor of the TCA).

We also find that the Ordinance violates § 253(c)'s rules regarding reasonable compensation. [HN21] A local government may demand compensation from telecommunications providers for their use of the public **[*22]** rights-of-way. See *47 U.S.C. § 253*(c). Any fee, however, must be directly related to the company's use of the right-of-way. See, e.g., *Prince George's County, 49 F. Supp. 2d at 817* ("If local governments were permitted under section 253(c) to charge franchise fees that were unrelated either to a telecommunication's company's use of the public rights-of-ways or to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [TCA's] pro-competition mandate and make a nullity out of section 253(a)); See also *City of Dallas, 8 F. Supp. 2d at 593.*

The Ordinance, as noted above, mentions at least four different fees to be imposed on providers. It does not, however, state the amount of the fees, how they are to be calculated, or how they relate to use of the public rights-of-way. It is not at all clear, from reading the Ordinance, that the fees do in fact relate to use of the public rights-of-way. Also, it is highly unlikely that four separate fees are all related to the use of the rights-of-way.

Because other Haverford ordinances impose fees for the use **[*23]** of "streets and sidewalks" and "poles and wires", n8 it also appears that Haverford is already being compensated for the use of its public rights-of-way. In any event, the mere fact that we must speculate about exactly what the Township is being compensated for demonstrates that the Ordinance is invalid. The TCA is clear: any fees charged must be related to use of the rights-of-way. The Ordinance does not, on its face, comply with this mandate.

n8 See generally The General Laws of the Township of Haverford ch. 134 (Poles and Wires) and ch. 157 (Streets and Sidewalks).

In addition, the Township's failure to publish a schedule of fees is in direct violation of § 253(c), which requires that "the compensation required [must be] publicly disclosed by [a local] government." The failure to publicize the fees also renders us unable to determine if Haverford has complied with § 253(c)'s requirement that compensation be imposed "on a competitively neutral and nondiscriminatory basis."

Finally, Section 5 [*24] of the Ordinance states that the franchise and license fees and the per-lineal-foot fees should be "audited". This suggests that the fees will be based on a percentage of the provider's revenue. [HN22] Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way. See, e.g., *Prince George's County, 49 F. Supp. 2d at 818* (holding that a fee based on a percentage of gross revenue was not related to the provider's use of the rights-of-way); *City of Dallas, 8 F. Supp. 2d at 593* (same). Again, however, the fact that we must speculate means that the Ordinance does not comply with TCA's very specific requirements.

Haverford argues that we should read the Ordinance in a way that would not violate the TCA--in other words, we should assume that the Township Manager and any other local officials charged with implementing it will do so in a manner consistent with the TCA. This flies in the face of the TCA, which preserves very specific authority to local governments. We will not just assume, based on nothing more than faith in the goodwill of the Township and its Manager, that Haverford has not overstepped that authority. Furthermore, [*25] it raises the very real possibility that Haverford will find itself in court every time it seeks to enforce the Ordinance, given § 253(c)'s requirement that different providers be regulated on a competitively neutral and nondiscriminatory basis. Haverford's "case-by-case" approach to adding flesh to the bones of the Ordinance thus does not satisfy the TCA. Rather than trusting Haverford lawfully to implement the Ordinance -- as it would have us do -- we find that the better course is to send the Township back to the drafting table. In sum, the safe harbor provision of § 253 does not give Haverford Township the right to impose whatever regulations it chooses on telecommunications providers whose equipment happens to pass through public rights-of-way.

2. The Ordinance is Invalid Under § 253(a)

Because we have concluded that the Ordinance is not entitled to safe harbor protection, we must analyze whether it prohibits or has the effect of prohibiting PECO's ability to provide telecommunications services

In *Prince George's County, 49 F Supp 2d at 814,* the Court held that a similar ordinance had the effect of prohibiting the provision of telecommunications services, [*26] stating that "any process for entry [into the market] that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way [violates § 253(a)]" (internal quotations omitted).

Here, the barriers to entry are even greater than in Prince George's County. The Ordinance provides absolutely no guidance to a provider about how to apply for a franchise or what the contents of such an application should be. Nor is there any guarantee that applications under this Kafkaesque regime, once submitted, will be processed expeditiously. Also, under the express terms of the Ordinance, the Township Manager, in his sole discretion, can completely prohibit the provision of telecommunications services, as the Ordinance merely provides that he "may" approve an application. Finally, the Ordinance imposes fees of uncertain amounts, a fact which, by itself, may serve as a significant barrier to entry.

We therefore conclude that the Ordinance violates § 253(a). Because we have determined that the Ordinance is not entitled to safe harbor protection, we hold that the Ordinance [*27] is preempted by, and violates, the TCA and thus must be struck down. n9

n9 Because we are granting PECO's requested relief on TCA grounds, we need not consider its claims under § 1983, the Contracts Clause of the United States Constitution, and Pennsylvania law.

ORDER

AND NOW, this 20th day of December, 1999, upon consideration of the parties' cross-motions for summary judgment and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that.

1. Plaintiff's motion for summary judgment is GRANTED;

2. Defendant's motion for summary judgment is DENIED;

3. JUDGMENT IS ENTERED in favor of plaintiff PECO Energy Co. and against defendant Township of Haverford;

4. Defendant's Ordinance No. 10-99 is declared NULL AND VOID, and defendant is ENJOINED from enforcing the Ordinance against plaintiff; and

5. The Clerk shall CLOSE this case statistically.

BY THE COURT:

Stewart Dalzell, J.

LEXSEE 2002 US DIST LEXIS 9965

RUTGERSWERKE AG and FRENDO S.p.A., Plaintiffs, - against- ABEX CORPORATION, PNEUMO ABEX CORPORATION and WHITMAN CORPORATION, Defendants.

93 Civ. 2914 (JFK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 U.S. Dist. LEXIS 9965

June 3, 2002, Decided
June 4, 2002, Filed

DISPOSITION: [*1] Defendants' motion for summary judgment granted and Plaintiffs' motion for summary judgment denied. All other pending motions denied as moot.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff buyers, who purchased the stock of a company running a brake manufacturing plant in northern Italy from defendant sellers, sued in diversity for contractual indemnification for environmental cleanup at the site. The sellers moved for summary judgment, arguing that the indemnity provisions in did not cover the cleanup at the plant

OVERVIEW: The indemnity clause and warranty in the stock purchase agreement expired one year after the purchase date. When investigating for expansion, the buyers found two abandoned landfills. Shortly before the limitation period expired, the buyers notified one of the sellers, in writing, of their belief that the landfills might expose them to liability, a material breach of representations and warranties. The court held that the indemnity demand failed to comply with the notice of claim requirements in the purchase agreement. Specifically, the notice failed to identify specific liability under the law caused by the landfills, so the buyers could not pursue indemnification. Due to the buyers' spoliation of evidence from two former plant employees that was contrary to the buyers' claims but that was discoverable statements of historical facts pertinent to the lawsuit, the court sanctioned the buyers by disallowing the plant employees' testimony. The buyers failed to show non-compliance with environmental law or statutory liability due to the landfills as of the closing date of the purchase or that they suffered losses due to non-compliance or an allegation of non-compliance.

OUTCOME: The court granted the sellers' summary judgment motion and denied the buyers' summary judgment motion. The court also denied as moot all other pending motions.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN1] The court may grant summary judgment only if the moving party is entitled to judgment as a matter of law because there is no genuine dispute as to any material fact. The role of the court on such a motion is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN2] The summary judgment movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions to file, together with affidavits, if any, that show the absence of a genuine issue of material fact. If the movant

meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose. Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. To show such a "genuine dispute," the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor. If the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact, then summary judgment must be denied

Contracts Law > Breach > Causes of Action
[HN3] To establish a breach of contract claim under New York law, a plaintiff must prove: (1) the existence of a contract between the parties; (2) plaintiff's compliance with the terms of the contract; (3) defendant's breach of the contract; and (4) damages as a result of the breach

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN4] To avoid summary judgment, a nonmovant must present specific evidence to support its position that there is a genuine issue of material fact.

Contracts Law > Contract Interpretation > Interpretation Generally
[HN5] Under New York law, a court must interpret a contract so as to give effect to all of its clauses and to avoid an interpretation that leaves part of a contract meaningless. Moreover, New York courts apply the canon of strict construction with particular force to indemnity provisions to avoid reading into an agreement a duty not anticipated by the parties.

Contracts Law > Contract Conditions & Provisions > Equitable Estoppel
[HN6] In an appropriate situation, a court may invoke the concept of regulatory estoppel to estop a party in a litigation from making a factual assertion contrary to a factual assertion made in the course of an administrative proceeding.

Evidence > Relevance > Spoliation
[HN7] Spoliation of evidence theory (also referred to as spoilation) to support their position. This doctrine refers to a party's intentional or negligent destruction of evidence that impairs another party's ability to prove or defend a civil action. When a party's intentional conduct causes the destruction of evidence, a district court has considerable discretion to impose a wide range of sanctions for purposes of leveling the evidentiary playing field and punishing the improper conduct. Such sanctions include ordering dismissal of the culpable party's suit, granting summary judgment in favor of the prejudiced party, precluding the culpable party from giving testimony regarding the destroyed evidence, or giving an adverse inference instruction to the jury against the culpable party. In considering whether to impose sanctions for spoliation of evidence, a court must initially determine whether the party against whom sanctions are sought had an obligation to preserve evidence.

Evidence > Relevance > Spoliation
[HN8] The duty to preserve evidence arises even prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.

Evidence > Relevance > Compromise & Settlement Negotiations
[HN9] *Fed. R Evid 408* forbids the admission of statements made during settlement talks to prove liability or the lack of liability.

Evidence > Relevance > Compromise & Settlement Negotiations
[HN10] See *Fed. R. Evid. 408.*

Evidence > Relevance > Spoliation
[HN11] In considering whether to impose sanctions based on spoliation, once a court determines that a party had a duty to preserve evidence, the court must then consider (1) the degree of fault of the party who destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the appropriate sanction.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN12] Not every issue of fact or conflicting inference presents a genuine issue of material fact.

International Law > Dispute Resolution > Conflicts of Laws
[HN13] *Fed. R Civ P 44.1* controls determinations of foreign law in federal court. Rule 44.1 gives a district court wide latitude in resolving issues of foreign law.

International Law > Dispute Resolution > Conflicts of Laws
[HN14] See *Fed R. Civ. P. 44.1.*

International Law > Dispute Resolution > Conflicts of Laws
[HN15] Because of the latitude granted to the court in *Fed. R. Civ. P. 44 1*, a court may reject even uncontradicted expert testimony and reach its own

decisions on the basis of independent examination of foreign legal authorities.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN16] Disagreement among legal experts on content, applicability, or interpretation of foreign law, as here, does not create genuine issues of material fact for summary judgment purposes

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Substances

[HN17] Italy's C.p. art. 674, entitled "Dangerous Throwing of Things," punishes whoever throws or pours in a place of public transit or in a private place of public or of other persons' use things that may offend, dirty or annoy other people This article applies only if the deteriorating substance or matter is poured or thrown in a place of public thoroughfare or in a private place used jointly.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Substances

[HN18] Italy's C.p. art. 440, read in conjunction with C.p. art. 452, relates to the negligent adulteration or counterfeiting of edibles and "punishes whomever corrupts water or food designated for consumption in a way that is dangerous for public health.

Environmental Law > Water Quality

[HN19] For Italy's C.p. art. 635 to apply in the public water-supply context, proof of pollution must exist.

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Substances

[HN20] The Italian DPR (Presidential Decree) no. 915 of September 10, 1982 represents the first Italian national statute governing, among other things, toxic and dangerous waste disposal in Italy. The DPR requires producers of special waste, including toxic and dangerous waste, to obtain authorization for the operation of any landfill. Based on the language of the statute and the ex post facto principle, this regulatory scheme imposes no retroactive obligations with respect to landfills that ceased operation prior to the effective date of the DPR. The DPR was approved on September 10, 1982, but according to Italian authorities, this statute only became effective on September 13, 1984, the publication date of the resolution called for under the DPR.

COUNSEL: For Plaintiffs: Richard Franklin, Esq., Of Counsel, BAKER & MCKENZIE, Chicago, Illinois.

For Abex Corporation and Pneumo Abex Corporation, Defendants: John Roberts, Esq., Of Counsel, FOGNANI GUIBORD HOMSY & ROBERTS, LLP, Chicago, Illinois.

For Whitman Corporation, Defendant: Kirk T. Hartley, Esq., Of Counsel, BUTLER RUBIN SALTARELLI & BOYD, Chicago, Illinois.

JUDGES: JOHN F. KEENAN, United States District Judge.

OPINIONBY: JOHN F KEENAN

OPINION:

OPINION and ORDER

JOHN F. KEENAN, United States District Judge:

Before the Court are the following motions: (1) motion for summary judgement by defendants Abex Corporation ("Abex"), Pneumo Abex Corporation ("Pneumo Abex"), and Whitman Corporation ("Whitman") (collectively "Defendants"); (2) Defendants' motion for partial summary judgment on the issue of whether the "dumps" were permanently closed in 1983; (3) Defendants' motion to strike; and (4) motion for summary judgment by plaintiffs, Rutgers AG (formerly known as Rutgerswerke AG and herein referred to as "Rutgers") and Frendo S.p. [*2] A ("Frendo") (collectively "Plaintiffs") The motions are opposed. The Court has jurisdiction over this action pursuant to *28 U.S.C § 1332* n1 The Court heard oral argument on these motions on May 16, 2002 and thoroughly considered all submissions made in connection with them. For the reasons stated herein, the Court grants Defendants' motion for summary judgment, denies Plaintiffs' motion for summary judgment and denies as moot all other pending motions

n1 Jurisdiction before this Court is predicated upon diversity of citizenship between the parties, see *28 U.S.C. § 1332*(a)(1), as plaintiff Rutgers is a German stock corporation with its principal place of business in Germany, plaintiff Frendo is an Italian stock corporation with its principal place of business in Italy, defendant Abex was a corporation organized and existing under the laws of Delaware with its principal place of business in New York, defendant Pneumo Abex is a corporation organized under the laws of Delaware with its principal place of business in New Hampshire, and defendant Whitman is a holding corporation

organized under the laws of Delaware with its principal place of business in Illinois and the amount in controversy exceeds the applicable jurisdictional minimum. See *Rutgerswerke AG v. Abex Corp., 1995 U S Dist. LEXIS 9285, No. 93 Civ 2914, 1995 WL 625701,* *1 (S.D N.Y. Oct. 25, 1995).

[*3]

Background

This lawsuit involves a dispute over who should bear financial responsibility for a landfill removal project at a brake manufacturing plant in Orzinuovi, Italy, a town located in the northern part of the country in an area known as the Lombardy Region. On January 23, 1970, the Mayor of Orzinuovi, upon consultation with the Hygienic Building Commission, granted authorization to construct the Orzinuovi plant. See Defs.' 56.1 Statement P 6; Roberts Aff, P 18; Ex. Q. From April of 1978 till the end of 1983, plaintiff Rutgers and defendant Abex, through wholly-owned subsidiaries, participated in a joint venture that owned and operated the Orzinuovi plant. See id. P 7; Roberts Aff., P 5; Ex. D. During this time period, Hans Bethke, the Rutgers official responsible for reducing the waste stream at the plant, visited and toured the facility about twice a year. See id. PP 8-9, Roberts Aff P 5; Ex. D, pp. 21, 34, 43 & 46. This tour included the backyard area of the plant where the underground landfills were located. See id PP 8-9; Roberts Aff. P 5; Ex D, pp 34, 43 At his deposition, Mr. Bethke testified that on these occasions he saw above-ground waste [*4] piles, but no underground landfills. See Roberts Aff P 5, Ex. D, pp. 43-45.

On or about September 22, 1980, the Region of Lombardy received a request for authorization to operate a waste disposal facility from Frendo, n2 pursuant to Lombardy Regional Law 94/1980. By this request, Frendo sought approval for the closure of two landfills and the opening of another landfill located at the Orzinuovi plant. See id. P 6, Ex E, pp. 41-54; Roberts Aff. P 14; Ex. M. In response to that request, on March 17, 1982, the Lombardy Region sent a notice asking for supplemental documentation. See Pls ' Resp. to Defs.' 56.1 ("Pls.' Resp.") P 11; Pls.' Ex. E, PP 6(c)-(e). Because of the failure to supply the requested information, on November 8, 1982, the Region informed Frendo officials that a denial of authorization was being processed. See id. By letter dated May 31, 1983, Frendo withdrew the September 1980 application for authorization to open the other landfill and submitted a request for authorization to temporarily store waste within the Orzinuovi plant. See Defs.' 56.1 Statement P 12; Roberts Aff., P 15; Ex. N. In response to this subsequent request, on October 25, 1983, the [*5] Lombardy Region rendered Deliberation No. III/32537, a statement officially acknowledging "the closing of the landfill disposal facility located" at the Orzinuovi plant. Id. P 13; Roberts Aff. P 13; Ex. L. The Deliberation directed Frendo to submit, within three months, a proposed environmental restoration plan prepared in cooperation with the Provincial Administration of Brescia, the local authority responsible for verifying implementation of the plan. See id. Shortly thereafter, on December 21, 1983, the Province of Brescia acknowledged receipt of the Deliberation confirming the closing of the landfill disposal facility at the plant and requested that Frendo forward documentation illustrating its proposed environmental restoration plan for the site. See id. P 14; Roberts Aff. P 16; Ex. O. Following an April 19, 1984 on-site inspection of the Orzinuovi plant, on April 30, 1984, the Province issued an official acknowledgment verifying compliance with the regulatory program. See id P 15; Roberts Aff. P 3; Ex. B, pp. 117-119; Roberts Aff. P 12; Ex. K, Roberts Aff. P 17; Ex. P. On September 8, 1993, the Province of Brescia's Waste Control Office prepared a chronology [*6] of events regarding the landfill situation at the Orzinuovi plant. See Roberts Aff. P 3, Ex. B, p. 55; Ex. H. This report states that, "after DPR 915/82 went into effect, Frendo permanently closed the landfill as evidenced by deliberation no. 32537 of the Lombardy Region dated October 25, 1983." Id. Ex. H, p. 3. Italian officials have never advised Frendo of a deficiency in any of its notifications or approvals. See Roberts Aff. P 3, Ex. B, pp. 93-94.

n2 "Frendo" hereinafter refers to the entity that owned and operated the Orzinuovi plant at any given time, unless otherwise specified.

1988 Share Purchase Agreement

Sometime after the conclusion of the joint venture, on April 28, 1988, defendant Whitman Corporation (then known as IC Industries, Inc.) and defendant Pneumo Abex (then known as PA Holdings Corporation) executed a stock purchase agreement (the "1988 Purchase Agreement"), under which Whitman agreed to sell to Pneumo Abex certain subsidiaries including defendant Abex Corporation ("Abex"), [*7] an entity that, in turn, owned 99.99% of the shares of Abex S.p.A., an Italian stock company. See First Am. Compl. Ex. C, § 1(a)(ii) & § 3(d); Pls.' 56.1, P 12. At that time Abex S.p.A. owned and operated the Orzinuovi plant. See id.

Thereafter, a dispute arose between Whitman and Pneumo Abex concerning certain provisions of the 1988 Purchase Agreement. See First Am. Compl.; Ex. G, p. 1.

To resolve the dispute, on September 23, 1991, Whitman and Pneumo Abex entered into a settlement agreement (the "Settlement Agreement") providing, among other things, that Whitman and Pneumo Abex would amend the 1988 Purchase Agreement by executing a document entitled "Second Amendment to Stock Purchase Agreement dated April 28, 1988" (the "Second Amendment"). See id.; Ex. G, p. 2. That same day, September 23, 1991, Whitman and Pneumo Abex executed the Second Amendment, which the parties dated August 29, 1988. See id.; Ex. H. Section 2 of the Second Amendment amended Section 12(b)(vi) of the 1988 Purchase Agreement to read:

> Seller hereby agrees to indemnify Buyer and its affiliates (including the Sold Subsidiaries) against and to hold them harmless from, any loss, liability, [*8] claim, damage or expense (including reasonable legal fees and expenses) suffered or incurred by Buyer or its affiliates for or on account of or arising from or in connection with . . .
>
> (a) any noncompliance or failure to comply with, violation of, or breach of any Applicable Environmental Law . . .;
>
> (b) statutory liability arising out of any releasing, spilling, . . . dumping, burying, placing, storing or disposing of any substance classified, defined, identified or designated as hazardous or toxic at any time prior to August 29, 1990, pursuant to Applicable Environmental Law or within the meaning given to the term hazardous or toxic under any Applicable Environmental Law . . .; or
>
> . . .
>
> (d) any investigation, proceeding, claim or allegation relating to any matter indemnifiable under (a) or (b) above.

Id.

Section 12(b)(vi), as amended, defines "Applicable Environmental Law" as "any federal, state, local and foreign statute, code, act, ordinance, regulation, requirement, or administrative rule and any permit, license, authorization, consent, notice, order, writ, subpoena or decree issued pursuant thereto relating to or as applied to pollution control, [*9] environmental contamination or protection of the environment, in each case limited to the extent and scope of recovery available at any time on or prior to August 29, 1990 . . . ." Id. P 12(b). Paragraph 3 of the Second Amendment provides: "The parties acknowledge . . . that the environmental matters listed on Schedule 12(b)(vi) [thereto] are included within [Whitman's] indemnification obligations under Section 12(b)(vi) as amended." Id. P 36. Schedule 12(b)(vi), in turn, lists "Italian Environmental (Frendo)." Id. P 37. The term "Italian Environmental (Frendo)" on Schedule 12(b)(vi) includes the landfills at the Orzinuovi plant. See Abex/Pneumo Abex Admission No. 56; Whitman Admission No. 40.

1989 Share Purchase Agreement

On January 2, 1989, plaintiff Rutgers and defendant Abex entered into a stock purchase agreement (the "1989 Purchase Agreement"), under which a subsidiary of Rutgers, Frendo S.r.l., purchased the capital stock in Abex S.r.l. (formerly Abex S.p.A.), which owned and operated the Orzinuovi plant. See First Am. Compl., Ex. A. n3 Abex represented and warranted to Purchaser (Frendo S.r.l.) and Parent (Rutgers) under section 3.1.7 of the 1989 [*10] Purchase Agreement that the Orzinuovi plant was not being conducted in violation of any applicable law, other than violations that did not have a material and adverse affect on the business or finances of the sold subsidiary, Abex S.r.l. n4 See id. § 3.1.7 Section 7.3(a) of the agreement provides that, subject to section 7.1, Abex "will indemnify, defend and hold harmless," Rutgers and Frendo S.r.l. with respect to "any and all claims, demands or suits (by any person or entity, including without limitation any Governmental Agency), losses or liabilities . . . relating to, resulting from or arising out of any material breach by [Abex] of any of the representations, warranties or covenants of [Abex]" contained in the agreement. Id. § 7.3(a). Section 7.1(a), in turn, contains a one-year limitation on Rutgers's (and Frendo's) ability to assert a breach of warranty claim and provides that "any claim for an alleged breach of representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued." Id. P 7.1(a). n5

n3 In May 1989, Frendo S.r.l. merged with Abex S.r.l. and assumed the name Frendo S.p.A., a plaintiff in this action. See First Am. Compl. P 12. [*11]

n4 Section 3.1.7. provides in pertinent part:

> Compliance with Laws. The business of the Sold Subsidiaries .

> . . is not being conducted, and neither of the Sold Subsidiaries . . . is, in violation of any applicable Law, other than violations which do not, and, insofar as reasonably can be foreseen, in the future will not, either individually or in the aggregate, have a material adverse affect on the business, financial condition or results of operations of the Sold Subsidiaries.

First Am. Compl., Ex. A, § 3.1.7.

n5 Section 7.1(a) provides in relevant part:

> Each of the representations and warranties . . . will survive the Closing and remain in full force and effect until the expiration of one year after the Closing Date or, if earlier, January 31, 1990, with the result that any claim for an alleged breach of a representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued.

First Am. Compl., Ex. A, P 7 1(a).

Plant Expansion Investigation and Discovery of Landfills [*12]

In September 1989, two Rutgers officials, Mr. Bethke and Mr. Bayer, began investigating the possibility of expanding the Orzinuovi facility by building in the area behind the plant. See Roberts Aff. P 5; Ex. D, pp. 96-99. During the course of this investigation, on September 28, 1989, these officials allegedly discovered the landfills. See id. Upon discovery, Mr. Bethke immediately questioned Frendo officials regarding the status of the landfills. See id. Ex. D, pp. 103-05. On October 6, 1989, in response to the inquiry regarding the waste situation, Mr. Colli, a Frendo manager, advised Mr. Bethke that the "dump inside the plant" was used "up to the second half of 1983" and that, "we presented on April 17, 1984 the land reclamation project of the interested area and we obtained the approval from 'Provincia' on April 30, 1984." Roberts Aff. P 11; Ex. J.

Shortly before expiration of the one-year limitation period, on October 23, 1989, Plaintiffs notified defendant Abex, in writing, of Plaintiffs' belief that underground landfills at the Orzinuovi plant might expose them to liability, thereby constituting a material breach by Defendants of representations [*13] and warranties under the 1989 purchase agreement. See Defs.' Supplemental 56.1 Statement, Ex. 1. In the letter, Plaintiffs stated: "While such waste disposal may or may not be partially covered by some official permit, it appears that at least a significant portion of the waste disposal on the Orzinuovi premises is not covered by any license or permit whatsoever." Id. The letter also explained: "We are currently in the process of investigating and inspecting the nature and scope of the waste disposal site as well as its legality." Id.

Plaintiff Frendo first notified Italian authorities about the landfills in an October 2, 1991 letter proposing a landfill removal project as part of a plan to modernize and expand the Orzinuovi plant and to comply with the dictates of an environmental policy recently prepared by Frendo's new management. See Roberts Aff., P 9; Ex. H. This letter made no reference to a violation of law as the reason for the project and came more than two years after the indemnity demand asserted against Defendants. All of Frendo's subsequent correspondence with Italian authorities likewise contained no mention of a violation of law as the impetus for the [*14] removal project. See id. Ex. H. On January 23, 1993, the Mayor of Orzinuovi issued an order relating to the removal of the landfills at the Frendo plant. See Coccia Decl., Tab R

Discussion

I. Summary Judgment Standards

[HN1] This Court may grant summary judgment only if the moving party is entitled to judgment as a matter of law because there is no genuine dispute as to any material fact. See *Silver v. City Univ. of New York, 947 F.2d 1021, 1022 (2d Cir. 1991); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989); Knight v. U.S. Fire Insur. Co., 804 F.2d 9, 11 (2d Cir. 1986).* The role of the Court on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight, 804 F.2d at 11;* see also *First Fed. Sav. & Loan Ass'n, 869 F.2d at 103* (stating that to resolve a summary judgment motion properly, a court must conclude that there are no genuine issues of material fact, and that all inferences must be drawn in favor [*15] of the non-moving party).

[HN2] The movant bears the initial burden of informing the Court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions to file, together with affidavits, if any," that show the absence of

a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* If the movant meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. See id.; *Silver, 947 F.2d at 1022.*

The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose. See *Gray v. Darien, 927 F.2d 69, 74 (2d Cir. 1991).* Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. See *Celotex Corp , 477 U.S. at 324; Twin Lab Inc v Weider Health & Fitness, 900 F 2d 566, 568 (2d Cir. 1990).*

To show such a "genuine dispute," the opposing party must come **[*16]** forward with enough evidence to allow a reasonable jury to return a verdict in its favor. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), Matsushita Elec Indus Co. v Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L Ed. 2d 538, 106 S. Ct 1348 (1986); Cinema North Corp. v. Plaza at Latham Assocs., 867 F 2d 135, 138 (2d Cir. 1989)* If "the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," then summary judgment must be denied. *Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9-10 (2d Cir. 1983).* The Court will analyze the summary judgment motions in accordance with these principles.

II. Plaintiffs' Motion For Summary Judgment

In May 1993, Plaintiffs brought this diversity action asserting contractual indemnification claims against Defendants for the cost of the landfill removal project at the Orzinuovi plant. n6 Plaintiffs move for summary judgment on their indemnity claims, arguing that no genuine issues of material fact exist. Specifically, Plaintiffs contend that they deserve summary judgment against **[*17]** Defendants because the remaining material facts in this case have been significantly narrowed as a result of Defendants' alleged failure to defend against claims potentially within the scope of the duty to indemnify.

> n6 Plaintiffs claim damages for the cost of the investigation and remediation of landfills at the Orzinuovi plant in the amount of the U.S. dollar equivalent of approximately DM 3,850,743 52 and Lira 21,268,488,677. See Pls.' Notice of Mot. at 3.

Plaintiffs argue that they are relieved of any responsibility of proving actual liability arising from the landfills at the Orzinuovi plant because Defendants breached their duty to defend against the claims made by Italian authorities. Plaintiffs base their argument on a line of New York cases involving breach of the duty to defend in which courts have held that where an indemnitor declines to defend, the indemnitor will be bound by any reasonable settlement reached by the indemnitee. In making this argument, Plaintiffs principally rely upon the following **[*18]** passage in *ELRAC, Inc. v Cruz, 182 Misc. 2d 523, 699 N.Y.S.2d 647 (N.Y Civ. Ct. Queens Co. 1999):*

> If, however, the indemnitor is given notice of the claim or proceeding against the indemnitee and declines to defend, then the indemnitor is conclusively bound by any reasonable good faith settlement the indemnitee may make or any litigated judgment that may be rendered against him. Under these circumstances, an indemnitee may recover based on its "potential liability", and need not demonstrate "actual liability" by providing the elements of the underlying claim against it. In other words, if sufficient notice was given, an [indemnitee] will have to show: (1) only "potential liability, to wit: that the indemnitee could have been found liable at the trial of the underlying action; and (2) that the underlying settlement was reasonable and made in good faith.

Id. at 649 (internal citations omitted).

In light of ELRAC, Plaintiffs maintain that they need establish only that: "(i) they could have been found potentially liable to the Italian Authorities; and (ii) that the underlying settlement with the Italian Authorities was reasonable and made in **[*19]** good faith." Pls.' Br. at 10. But the ELRAC string of cases is inapposite. As Defendants point out, unlike in this case, each of those cases involved a situation in which a third party brought a suit against the indemnitee that plainly fell within the given indemnity provision's coverage, thereby triggering the indemnitor's duty to defend, whereas here no third party ever instituted a lawsuit triggering Defendants' defense obligations. Neither Plaintiffs' October 23, 1989 letter expressing the belief that the landfills might expose them to potential liability, nor the Mayor's January 23, 1993 order triggered any defense obligations under the indemnification provisions because neither situation presented Defendants with anything to defend. n7 Contrary to Plaintiffs' assertion, Defendants never

declined to defend the claims of Italian authorities for the simple reason that there were no formal claims to defend against, or, at the very least, there was insufficient notice of any such claim. n8 See *Atlantic Richfield Co v Interstate Oil Transport Co, 784 F.2d 106, 113 (2d Cir. 1986)* ("Notice sufficient to give the indemnitor a meaningful opportunity to defend is **[*20]** the indispensable element to be proven by the party seeking indemnity. . . . Where notice - which includes a meaningful opportunity to assume the defense - is lacking, a demonstration of actual liability is required."); *Carey Transp. v Greyhound Co, 80 B.R 646, 652-53 (Bankr. S.D.N.Y 1987)* ("Where an indemnitor is subject to an express duty to defend, and where the indemnitee fails to give adequate notice of the claim or makes a settlement without giving the indemnitor reasonable opportunity to participate, the indemnitee cannot recover indemnity for the settlement without proving actual liability."). This is illuminated by the fact that Plaintiffs point to no evidence indicating that they acted in Defendants' stead in pursuing a defense against any claim made by Italian authorities. Quite the contrary, evidence in this case indicates that Plaintiffs tried to create a "violation of law" to create indemnity claims by drafting the cleanup order ultimately issued by the Mayor of Orzinuovi and by failing to contest the order, despite Plaintiffs' knowledge of its invalidity.

n7 In the insurance-coverage context, courts have explained the duty to defend concept as follows: "the duty to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability." *Hugo Boss Fashions, Inc. v. Federal Insur., 252 F.3d 608, 627-28 (2d Cir. 2001)* (quoting *Servidone Constr Corp v. Sec. Ins Co. of Hartford, 64 N.Y 2d 419, 488 N.Y S.2d 139, 477 N.E.2d 441, 444 (1985))*. **[*21]**

n8 Plaintiffs' argument for an award of summary judgment in their favor is premised upon a failure to defend theory. But this theory utterly fails against defendant Whitman for the simple reason that the 1988 SPA, as amended, does not contain a duty to defend clause. For this reason alone, then, plaintiff Frendo is not entitled to summary judgment against Defendant Whitman.

Accordingly, the Court denies Plaintiffs' motion for summary judgment against Defendants.

III. Defendants' Motion For Summary Judgment

Defendants brought a motion for summary judgment, arguing that they are entitled to judgment as a matter of law because the indemnity provisions at issue do not cover the cleanup at the Orzinuovi plant. The question presented by this motion is whether the cost of Plaintiffs' landfill-removal project falls within Defendants' indemnification obligations as defined by the 1988 Purchase Agreement, as amended, and the 1989 Purchase Agreement.

This issue is one of New York law because both contracts specify that they are governed by the laws of New York. See First Am. Compl., Ex. **[*22]** A, § 10.9(a); Ex. C, § 75. [HN3] To establish a breach of contract claim under New York law, a plaintiff must prove: (1) the existence of a contract between the parties; (2) plaintiff's compliance with the terms of the contract; (3) defendant's breach of the contract; and (4) damages as a result of the breach. See *Prince v. American Airlines, Inc, 1999 U.S. Dist. LEXIS 15550, 1999 WL 796178,* No. 97 Civ 7231, at *7 (S.D.N.Y Oct. 6, 1999), see also *Terwilliger v Terwilliger, 206 F.3d 240, 245-46 (2d Cir 2000)* [HN4] To avoid summary judgment, a nonmovant must present specific evidence to support its position that there is a genuine issue of material fact. See *Banca Commerciale Italiana v. Northern Trust Int'l Banking Corp., 160 F.3d 90, 93 (2d Cir. 1998); Marks v. New York Univ., 61 F. Supp. 2d 81, 88- 89 (S D N Y. 1999).*

Defendants contend that Plaintiffs have failed to create a triable issue of material fact to support one of these essential elements - to wit, that Plaintiffs suffered damages as a result of the alleged breach. Given that the indemnity provision under the 1989 Purchase Agreement differs from the indemnity provision under the 1988 Purchase **[*23]** Agreement, as amended, the Court will discuss them separately.

A. Contractual Indemnification Under 1989 Purchase Agreement

In count I of their amended complaint, Plaintiffs assert a claim against defendants Abex and Pneumo Abex ("Defendants") for indemnification under the 1989 Purchase Agreement for losses incurred on account of removing allegedly unlawful landfills at the Orzinuovi plant. See First Am. Compl. PP 7-21. Section 7.3(a) of the 1989 Purchase Agreement obligates Defendants to indemnify Plaintiffs in connection with any loss resulting from a material breach of Defendants' representation of Frendo's compliance with applicable law. See First Am. Compl.; Ex. A, § 7.3(a), pp. 39-40; § 3.1.7, pp. 15-16. The introductory phrase of section 7.3 makes this indemnity obligation subject to the procedural limits set

forth in section 7.1. See id.; Ex. A, § 7.3, p. 39 Pursuant to section 7.1(a), any notice of claim for indemnification must satisfy both a timeliness and a specificity requirement. Section 7.1(a), the "survival" provision, provides in relevant part.

> Each of the representations and warranties . . . will survive the Closing and remain in **[*24]** full force and effect until the expiration of one year after the Closing Date or, if earlier, January 31, 1990, with the result that any claim for an alleged breach of a representation or warranty which is not asserted by written notice given as herein provided which describes the basis for such claim with specificity may not be pursued.

Id ; § 7.1(a), p. 38.

By virtue of section 7.1(a), the time period in which Plaintiffs could make an indemnity demand expired on January 31, 1990, the one-year anniversary of the closing date. See First Am. Compl. P 9 (alleging that "the purchase and sale provided for in the 1989 Stock Purchase Agreement was closed on or about January 31, 1989 (the "1989 Closing Date")."). Based on section 7.1(a)'s specificity provision, written notice of a claim predicated on the compliance representation should identify specific liability under the law. Defendants argue that Plaintiffs cannot pursue an indemnity claim because they did not give proper notice of their claim within the one-year period allowed for in the 1989 Purchase Agreement Plaintiffs contend that their October 23, 1989 letter to Defendant Abex - advising of Plaintiffs' belief **[*25]** of a possible breach under the 1989 Purchase Agreement - satisfies section 7.1(a).

Plaintiffs sent the demand letter more than three months prior to expiration of the one-year period. But to fulfill the conditions of section 7.1(a), the October 23, 1989 notice must satisfy the specificity requirement as well. Based on the contractual language, section 7.1(a)'s two requirements go hand-in-hand; thus, a bare assertion of a claim for indemnity within the one-year window is meaningless without accompanying details regarding the basis for the claim. Any other interpretation of section 7.1(a) would eviscerate its specificity clause, a result contrary to the rules of contract construction. This is so because [HN5] under New York law, the governing law specified in the 1989 Purchase Agreement, a court must interpret a contract so as to give effect to all of its clauses and to avoid an interpretation that leaves part of a contract meaningless See *Insurance Co. of North America v. ABB Power Generation, Inc , 925 F. Supp 1053, 1058-59 (S D N.Y 1996).* Moreover, New York courts apply the canon of strict construction with particular force to indemnity provisions to avoid reading into **[*26]** an agreement a duty not anticipated by the parties. See *TD Waterhouse Investor Srvcs. Inc. v. Integrated Fund Srvcs., Inc., 2002 U.S. Dist. LEXIS 4672, No. 01 Civ. 8986, 2002 WL 441123c,* at *2 (S.D.N.Y. Mar. 21, 2002). With all of this in mind, the Court turns to an analysis of whether Plaintiffs gave proper notice of their claim within the one-year time period as required by section 7.1(a).

The October 23, 1989 letter asserts a right to indemnity on account of a possible breach of the "compliance with law" representation. In that letter, Plaintiffs express, in a general fashion, the opinion that landfills at the Orzinuovi plant might not comply with Italian law: "while such waste disposal may or may not be partially covered by some official permit, it appears that at least a significant portion of the waste disposal on the Orzinuovi premises is not covered by any license or permit whatsoever." First Am. Compl.; Ex. B. The letter does not indicate the basis for this impression, nor does it specify which Italian law, if any, the existence of the landfills possibly violated. The letter advises that an investigation into the legality of the landfills was still ongoing. See id.

For starters, **[*27]** the mere presence of landfills at a manufacturing plant was not per se unlawful under Italian law because government officials issued permits authorizing such activity (as was the case here). See, e.g., Roberts Aff. P 17, Ex. P; see also Defs.' Ex. 52, pp. 5-6 ("Until 1976, no specific legislation (whether national or regional) existed in Italy dealing specifically with wastes disposal and/or water pollution."). In that sense, Plaintiffs could not properly make a claim for indemnity simply based upon the discovery of landfills. Plaintiffs' letter intimates as much given the acknowledgments that at least some of the waste disposal might be officially authorized and that the situation called for further investigation. Meanwhile, despite Plaintiffs' implication to the contrary, at this point in their investigation, they had no reason to conclude that landfills at the Orzinuovi plant created any illegality. In fact, on October 6, 1989, in response to Plaintiffs' inquiry regarding the legal status of the landfills, Frendo management advised Plaintiffs that the "dump inside the plant" was used "up to the second half of 1983" and that, "we presented on April 17, 1984 the land **[*28]** reclamation project of the interested area and we obtained the approval from 'Provincia' on April 30, 1984." Defs.' 56. *30 Kan 1, 1 P 19,* Ex. J. In light of this, when Plaintiffs made their indemnity demand they had information indicating official approval of the waste disposal at the Orzinuovi plant.

Moreover, Plaintiffs engaged in a questionable course of conduct after making their indemnity demand. This behavior included ignoring Abex's requests for more information regarding the basis for Plaintiffs' claim. For instance, after receipt of the October 23rd demand, Abex responded on October 31, 1989 by requesting proof to support Plaintiffs' claim and asking for access to Frendo employees with knowledge of the relevant facts. See Defs.' 56. *1 P 62;* Tab 2. That October 31 letter notified Plaintiffs of the lack of specificity in their notice. "the letter of October 23, 1989 does not give us enough facts to conclude one way or the other whether there was a material breach of any representations, warranties or covenants under the Stock Purchase Agreement or whether there is a duty to indemnify." Id. On at least two separate occasions, Abex requested more specific **[*29]** information concerning the basis for Plaintiffs' indemnity demand, each time giving Plaintiffs an opportunity to specify their claim within the one-year limitation period. See, e.g., Defs ' 56.1 PP 63-64; Tabs 3 & 4 These numerous requests, however, went unheeded n9 Plaintiffs also neglected to conduct a timely inquiry into the permit history of landfills at the plant, a seemingly obvious step in an investigation of this type In this regard, Plaintiffs' representative who was primarily responsible for gathering facts concerning the landfills and for dealing with Italian authorities with respect to the landfill situation testified that he made no attempt to ascertain any information regarding permit authorization for the landfills, a telling admission See Roberts Aff. P 3; Ex. B, pp. 89-90. Additionally, the record reflects that Plaintiffs waited almost one and one-half years after the October 23rd indemnity demand to retain Italian counsel to analyze Italian environmental requirements as they relate to potential claims against Abex with respect to the Orzinuovi plant. See Defs ' 56 *1 P 81;* Tab 8. This factor implies that as of October 23, 1989 Plaintiffs **[*30]** knew of no legal ground on which to base their claim for indemnity, which explains (but hardly absolves) the failure to specify potential liability under the law in their notice of claim. Furthermore, Plaintiffs waited nearly two years after giving notice to Defendants before informing Italian authorities, on October 2, 1991, of the presence of landfills at the Orzinuovi plant See Defs.' Exs., Tab 16. Their October 2nd notification mentions nothing about a violation of law as the reason for Plaintiffs' proposed landfill removal project, even though Plaintiffs took care to draft the letter in such a way as to avoid damaging "our litigation in the United States." See Defs. Exs., Tab 12. Despite this goal, at no time during their discussions with Italian authorities did Plaintiffs state that the reason for their proposed removal project was due to concerns about the legality of the landfills

n9 Plaintiffs sent Abex a letter on November 23, 1989, but this communication failed to illuminate the basis for Plaintiffs' claim with respect to the landfills, as Plaintiffs' own position reflects: "The December 21, 1989 letter responds to plaintiffs' November 23, 1989 letter, which deals exclusively with matters other than the Orzinuovi Dumps. These letters are completely irrelevant to matters in controversy in this litigation." Pls.' Resp. to Defs.' Suppl. 56. *1 P 63.*

[*31]

Moreover, Plaintiffs' improper conduct included a covert campaign to generate grounds for their indemnity demands against Defendants. Despite Defendants' request that the parties work together in dealing with government officials, Plaintiffs pursued a campaign of secrecy and concealment regarding their dealings with Italian authorities. See Defs. Supplemental 56. *1 P 91,* Tab 12. For example, during one of Plaintiffs' private meetings with the Mayor of Orzinuovi about the landfills, Plaintiffs' representative asked the Mayor whether "it is possible to have from him a mandatory request to proceed" with Plaintiffs' already proposed remediation project. See *id. P 100,* Tab 26. Plaintiffs' campaign also involved coaxing the Mayor to issue the January 23, 1993 order requiring plaintiff Frendo to undertake a landfill cleanup project, an order that Plaintiffs' counsel secretly drafted and requested. See id. P 109, Tabs 56, 57. In addition to this, after informing Plaintiffs that the order was invalid and without legal effect, Plaintiffs' lawyer then stated, "I assume these developments should not be disclosed to Abex." Roberts Aff P 20, Ex. **[*32]** S. In pressing their indemnity rights here, Plaintiffs make much of this order, classifying it as a "claim" asserted against them by Italian authorities. But given the dubious pedigree of the order, this so-called "claim" is little more than a claim of Plaintiffs' own creation.

The Court concludes that Plaintiffs' October 23rd indemnity demand fails to specifically particularize the basis for their claim as required by section 7.1(a). Because of Plaintiffs' lack of compliance with the notice of claim requirements set forth in section 7.1(a), namely, the failure to identify specific liability under the law on account of the landfills, they cannot pursue a claim for indemnification under the 1989 Purchase Agreement. Therefore, the Court grants defendants Abex and Pneumo Abex summary judgment as to count I of Plaintiffs' amended complaint.

B. Contractual Indemnification Under 1988 Purchase Agreement

In count II of their amended complaint, plaintiff Frendo ("Plaintiff") asserts a claim against defendant Whitman ("Defendant") for indemnification under the 1988 Purchase Agreement for losses associated with the landfill removal project at the Orzinuovi plant. See First Am. [*33] Compl. PP 30-41. Whitman represented and warranted under section 5(i) of the 1988 Purchase Agreement that the Orzinuovi plant was not being conducted in violation of any applicable law, other than violations that did not have a material and adverse effect on the business or finances of Frendo. See id. § 5(i). Section 12(b)(i) obligated Defendant to indemnify the buyer in connection with any loss resulting from a breach of any representation provided by Defendant in section 5. See id. § 12(b)(i). Section 12(b)(i)'s broad indemnification provision expressly excludes environmental matters, for which indemnification provisions are set forth separately in section 12(b)(vi). See id. Section 12(b)(vi) of the 1988 Purchase Agreement, as amended by section 2 of the Second Amendment, obligates Defendant to indemnify the buyer from any liability incurred by the buyer on account of: (a) any noncompliance with any Applicable Environmental Law, (b) statutory liability arising out of any dumping of a substance classified as hazardous or toxic under any Applicable Environmental Law; or (d) any investigation, proceeding, claim or allegation relating to any matter indemnifiable under (a) [*34] or (b). See id.; Ex. H, § 2. Based on this contractual provision, to obtain indemnity, Plaintiff must prove not only the Orzinuovi plant operator's non-compliance with applicable law or statutory liability because of the landfills, but must also establish that Plaintiff suffered losses because of the non-compliance or because of a claim or allegation of non-compliance. The Court rejects the notion that the Mayor's January 23rd order meets this requirement. Plaintiffs, however, also argue that under Italian law, the Orzinuovi plant operator had an affirmative duty to remove the landfills regardless of a governmental directive to do so. Because of this, the Court will analyze the Italian regulations that Plaintiffs claim Frendo, as plant operator, was out of compliance with as of the closing dates of the 1988 Purchase Agreement and the 1989 Purchase Agreement.

1.Time Frame of Landfill Usage

Before analyzing whether the landfills violated any of the Italian regulations cited by Plaintiffs, the Court will consider an issue raised by Defendants in their motion for partial summary judgment, namely, the time frame in which Frendo utilized landfills at the Orzinuovi plant, [*35] insofar as this issue impacts the violation of law analysis.

In their amended complaint, Plaintiffs allege that landfill usage at the plant occurred from approximately 1971 to approximately 1986. See First Am. Compl. P 13. Defendants argue that the evidence in this case fails to support this allegation for a variety of reasons. First, Defendants argue that because plaintiff Frendo's predecessor company represented in written submissions to Italian regulatory authorities that landfills located at the Orzinuovi plant were permanently closed in 1983 and reclaimed in 1984, the doctrine of regulatory estoppel precludes Plaintiffs from asserting a position contrary to this representation, namely, that landfills at the Orzinuovi plant were used until 1986. See First Am. Compl., count I, P 13. Defendants cite *Tozzi v. Long Island Railroad Co., 170 Misc. 2d 606, 651 N.Y.S.2d 270, 274-75 (N.Y. Sup. 1996),* as support for the availability of regulatory estoppel. In Tozzi, the court relied upon principles underlying the doctrine of judicial estoppel to conclude that, [HN6] in an appropriate situation, a court may invoke the concept of regulatory estoppel "to estop a party [*36] in a litigation from making a factual assertion contrary to a factual assertion made in the course of an administrative proceeding." Id. at 275. But application of this theory is not appropriate where, as here, the initial factual representations were not made during the course of a formal regulatory proceeding. See id. The Tozzi court declined to apply regulatory estoppel in that case because: "in the instant action, the subject endorsement was adopted in the State of New York by a single letter request setting forth the proposed amendment. No hearings were conducted. No regulatory proceedings of any nature were conducted requiring the insurer's presence. The insurer did not submit a sworn written statement or make any factual representations under oath." Id. Like in Tozzi, the factual assertions at issue here were not made in the course of an administrative proceeding, nor were they made under oath. Based on the reasoning in Tozzi, in particular, that absent a prior regulatory proceeding analogous to a judicial prosecution of an action, utilizing the concept of regulatory estoppel against a litigant is improper, the Court declines to apply regulatory estoppel [*37] in this case.

According to evidence in this case, in October 1983, regulatory authorities issued a statement officially acknowledging the closure of the landfill disposal facility at the Orzinuovi plant. Moreover, after conducting an on-site inspection of the plant in April 1984, regulatory officials acknowledged Frendo's compliance with the program for reclamation of the site. Defendants argue that this official confirmation of closure, among other things, conclusively establishes that Frendo ceased on-site usage of landfills in 1983, or, at the very least, as of April 1984 when regulators conducted the on-site inspection.

In support of their allegation of post-inspection dumping, Plaintiffs hope to rely upon the testimony of two Frendo plant employees, Messrs. Pizzamiglio and Vianelli, at least one of whom has sworn that landfills at the Orzinuovi plant were used as late as 1986. These statements, however, are gravely suspect. Specifically, Defendants argue that Plaintiffs cannot use any testimony from these witnesses to prove post-inspection dumping because Plaintiffs deliberately destroyed prior sworn affidavits by the same two men. See Defs.' 56.1 Statement P 47. Back in [*38] 1992, Plaintiffs began compiling evidence regarding the history of the landfills in order to convince Defendants to pay the "maximum amount" toward the cleanup costs. See Roberts Aff. P 23; Ex. V. To do so, Plaintiffs enlisted Mr. Colli, the Orzinuovi plant manager and a Managing Director of plaintiff Frendo, to obtain the affidavits of Messrs. Pizzamiglio and Vianelli. At his deposition, Mr. Colli testified that after obtaining these sworn statements he deliberately destroyed them sometime after June 1992. See Roberts Aff. P 3; Ex. B, p. 111. He also testified that Messrs. Pizzamiglio and Vianelli signed the affidavits, but: "Before sending the affidavits, I was in contact with our lawyers, and I said, 'If we go this way, we are going to sign that we did something illegal. I want to be sure that our people are not going to have a problem of that.'" Id. at 110; see id. ("Because the people signed the paper, Pizzamiglio and Vianelli, but we didn't deliver to anybody these papers.") Later in the deposition, Mr Colli was asked whether he provided a copy of those affidavits to anyone else, to which he responded in the negative. See id. at 112.

In the course of discovery, [*39] Plaintiffs produced copies of unsigned affidavits, one each from Messrs. Pizzamiglio and Vianelli, stating that landfill usage at the Orzinuovi plant occurred between 1974 and 1982. See Defs.' 56.1 Statement P 49; Roberts Aff. P 26; Ex. Y. Defendants point out that the information contained in these unsigned affidavits therefore contradicts Plaintiffs' allegations of post-inspection use of landfills at the Orzinuovi plant. Notwithstanding the contents of the unsigned affidavits, Plaintiffs have elicited testimony from Mr. Vianelli to the effect that dumping of small amounts of scrap material at the plant occurred as late as 1986. See id.; Roberts Aff. Ex. W, pp. 110-11.

In response, Plaintiffs now explain that their counsel prepared draft affidavits of Messrs. Pizzamiglio and Vianelli sometime in late 1992 (specifically, sometime between November of 1992 and December 17, 1992) as part of settlement negotiations with Whitman and Abex. See Pls.' Resp. to Defs.' 56. *1 P 43;* Hackett Decl. PP 4-6. In particular, Plaintiffs submit the declaration of David P. Hackett, Esq. (the lead counsel for Rutgers and Frendo in connection with these negotiations), which states [*40] that sometime after November of 1992, he prepared draft affidavits of Messrs. Pizzamiglio and Vianelli, and, on December 17, 1992, he sent the drafts to these two gentlemen as well as Mr. Marcoaldi, Plaintiffs' environmental expert, for their review. See Hackett Decl. PP 3-6. Mr. Hackett then swears that, on December 18, 1992, Mr. Colli returned to him the unsigned affidavits that Hackett had prepared for Messrs Pizzamiglio and Vianelli and that these are the unsigned affidavits produced to Defendants during the discovery phase of this case. See *id. P 6.*

Even still, a July 10, 1992 communication between Plaintiffs' lawyers (which included Mr. Hackett) seems to establish their knowledge of some form of affidavit from both Messrs. Pizzamiglio and Vianelli to the effect that landfill usage at the Orzinuovi plant ceased in 1982. This July 10, 1992 facsimile message, addressed to Mr. Hackett, among others, states:

> At the meeting of July 1st, 1992, in Frankfurt (attending Mr. Buttner, Mr. Streit, Mr. Colli and Mr. Marcoaldi), Mr. Buttner stressed that the wording used in the affidavits of Messrs. Pizzamiglio and Vianelli should be further discussed with you. The present [*41] wording, in fact, contains no specific indication as to the location of the waste disposals after 1982 (see my fax of July 1st, 1992). This conflicts with the audit prepared by PAR eighteen months ago (presently held by Whitman) where the location of the waste disposals after 1982 is indicated. Mr. Buttner is concerned that Whitman could point out the contradiction."

Defs.' Exs., Tab 39 (emphasis supplied).

This message no doubt could refer to other affidavits of Messrs. Pizzamiglio and Vianelli, perhaps the signed affidavits entrusted to Mr. Colli. One thing is certain, though, this fax communication highlights Plaintiffs' deep concern with avoiding "conflicts" and "contradictions."

Based on these circumstances, Defendants ask the Court to exclude any testimony from Messrs. Pizzamiglio and Vianelli contradictory to the two unsigned affidavits produced during discovery. Defendants rely on the [HN7] spoliation of evidence theory (also referred to as "spoilation") to support their position. This doctrine refers to a party's intentional or negligent destruction of evidence that impairs another party's ability to prove or defend a civil action. See *West v. Goodyear Tire & Rubber Co , 167 F.3d 776, 778*

(2d Cir. 1999) [*42] ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."). When a party's intentional conduct causes the destruction of evidence, a district court has considerable discretion to impose a wide range of sanctions for purposes of leveling the evidentiary playing field and punishing the improper conduct. See *Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 888 (S.D.N.Y. 1999)* ("It is well settled that the Court has the . . . power to sanction a party that destroys relevant and discoverable evidence [based on, among other things,] a court's inherent power to regulate litigation, preserve and protect the integrity of the proceedings before it, and sanction parties for abusive practices."). Such sanctions include ordering dismissal of the culpable party's suit, granting summary judgment in favor of the prejudiced party, precluding the culpable party from giving testimony regarding the destroyed evidence, or giving an adverse inference instruction to the jury against the culpable party. See *Trigon Insur. Co. v United States, 204 F.R.D 277, 285 (E.D. Va. 2001)* [*43]

In considering whether to impose sanctions for spoliation of evidence, a court must initially determine whether the party against whom sanctions are sought had an obligation to preserve evidence. See *Indemnity Insur. Co. of North Amer. v. Liebert Corp., 1998 U.S Dist. LEXIS 9475, No. 96 Civ. 6675, 1998 WL 363834,* at *3 (S.D.N.Y. June 29, 1998). [HN8] The duty to preserve evidence arises even prior to the filing of a complaint "where a party is on notice that litigation is likely to be commenced." Id. at *3. In such a situation, the party is obligated to preserve "what it knows, or reasonably should know, will be relevant in the action." *Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991),* see also *Kudatzky v. Galbreath Co., 1997 U.S. Dist. LEXIS 14445, No. 96 Civ. 2693, 1997 WL 598586* (S.D.N.Y. Sept. 23, 1997) ("The threshold question with respect to imposing sanctions for document spoilation based on the court's inherent powers is whether the party knew or should known that the destroyed evidence was relevant to pending, imminent or reasonably foreseeable litigation." (internal quotation marks omitted)).

Here, Plaintiffs had notice that litigation could likely commence [*44] with respect to the waste disposal situation. For example, Plaintiffs specifically obtained the affidavits in response to advice from their lawyers that information regarding the timing of the waste disposal was important to resolving claims between the parties. See Roberts Aff. P 3; Ex. B, pp. 108-09. Moreover, Plaintiffs now argue that these affidavits are immune from allegations of spoliation based on the confidentiality of compromise negotiations under *Federal Rule of Evidence 408* because they were prepared in the course of settlement discussions. [HN9] Rule 408 forbids the admission of statements made during settlement talks to prove liability or the lack of liability. n10 The Rule, however, provides no support for Plaintiffs' deliberate destruction of this evidence. That is so because the Court finds that the affidavits constitute otherwise discoverable evidence, explicitly made admissible by the terms of Rule 408, since, from all indications, they contained only historical factual information otherwise discoverable as deposition testimony. See *Fed. R. Evid. 408* ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented [*45] in the course of compromise negotiations.").

n10 [HN10] Rule 408 provides, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.
>
> *Fed. R Evid 408.*

In light of this, Plaintiffs reliance on *Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp., 817 F. Supp. 225, 229 (D.N.H. 1993),* is misplaced, for that case involved a situation where the court disallowed an affidavit that incorporated statements made during settlement negotiations. Unlike in Kleen Laundry, the affidavits here included statements of historical facts pertinent to this lawsuit. As such, these affidavits were "otherwise [*46] discoverable" and thus were not subject to exclusion under Rule 408. The Court therefore concludes that Plaintiffs deliberately destroyed the affidavits after the obligation to preserve them arose and after Plaintiffs had clear notice of this obligation.

[HN11] Once a court determines that a party had a duty to preserve evidence, the court must then consider: (1) the degree of fault of the party who destroyed the

evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the appropriate sanction. See *Indemnity Insur., 1998 U.S Dist. LEXIS 9475, 1998 WL 363834,* at *3. The evidence before the Court provides a sufficient basis for finding that Plaintiffs intentionally destroyed the affidavits to prevent their use in future litigation. For one thing, Plaintiffs and their counsel apparently were concerned that the contents of similar affidavits would undermine Plaintiffs' position on issues important in this case. Moreover, the destruction of this evidence was not accidental or inadvertent. Quite the contrary, Mr. Colli, a high-ranking official of plaintiff Frendo, admitted that he purposely destroyed the affidavits sometime after June 1992, apparently after deciding that the contents [*47] of the affidavits might establish that Frendo employees engaged in illegal activities with respect to waste disposal. See Roberts Aff. P 3; Ex. B, p. 110. The Court rejects Plaintiffs' argument that the record does not establish that Mr. Colli acted within the scope of his employment at the time that he destroyed the affidavits. In this respect, Mr. Colli collected the affidavits on behalf of his employer and then contacted Plaintiffs' lawyers, whom he referred to as "our lawyers," allegedly to discuss whether the affidavits suggested that Frendo employees had acted wrongfully. It was after this conversation that Mr. Colli apparently destroyed the evidence.

Based on the foregoing, the Court finds Plaintiffs highly culpable for the destruction of this evidence. The Court also finds that Defendants are significantly prejudiced by the loss of this evidence because now Defendants cannot use these prior sworn statements as admissions regarding the time period of landfill usage, nor can Defendants use the statements to impeach the new and contradictory testimony given by Messrs. Pizzamiglio and Vianelli. Moreover, although Defendants deposed these two gentlemen, they provided only sketchy [*48] testimony regarding the contents of the destroyed affidavits. Also, Defendants have provided inferential evidence (the unsigned affidavits) as to the possible contents of the missing materials, which indicates that such materials would have been harmful to Plaintiffs' case. See *Skeete v. McKinsey & Co., Inc., 1993 U S Dist. LEXIS 9099, No. 91 Civ. 8093, 1993 WL 256659,* at *7 (S.D.N.Y. July 7, 1993).

Pursuant to the spoliation doctrine, Defendants ask the Court to sanction Plaintiffs by precluding them from giving testimony from Messrs. Pizzamiglio and Vianelli contradictory to their two unsigned affidavits. Given the record in this case, such a sanction is appropriate. Mindful of the serious nature of this sanction, the Court nonetheless finds such a penalty fitting given the deliberate destruction of evidence and Plaintiffs' overall bad behavior in their pursuit of indemnification.

Besides the deposition testimony from these two gentlemen that dumping of small amounts of scrap material at the Orzinuovi plant occurred as late as 1986, Plaintiffs offer virtually nothing else to suggest post-inspection landfill usage. Regarding this issue, Plaintiffs' environmental expert, Mr. Marcoaldi, identifies [*49] other things that allegedly establish post-inspection usage, including: (1) "pieces of production specific to the period '78/'79 were found during excavation;" (2) accounting documents dated 1976 were found during the removal project that "in principle should be kept for ten years;" (3) some worker (whom the report fails to name) remembers that excavations were made in the backyard area of the plant; and (4) "one purchase order and relevant invoice confirm use of bulldozer and excavator in that area at [the] beginning of January 1988." Pls.' Exs., Tab V, tbl. 3.2.

These items cannot support a finding of post-inspection landfill usage insofar as a conclusion predicated on them would amount to mere guesswork or conjecture. [HN12] Not every issue of fact or conflicting inference presents a genuine issue of material fact. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L Ed. 2d 202, 106 S Ct. 2505 (1986)* ("There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (internal [*50] citations omitted)). The evidence here is not significantly probative on the issue of post-inspection landfill usage so as to create a genuine issue of material fact requiring denial of summary judgment.

Therefore, in terms of the violation of law analysis, this Court will proceed on the basis of no post-inspection landfill usage, i.e., that no on-site dumping occurred after regulators confirmed closure of the landfills at the Orzinuovi plant in April of 1984.

2. Alleged Violations of Italian Law

Each side offers the opinion of a foreign legal expert concerning issues of Italian law relevant to the case. With respect to their violation of law contentions, Plaintiffs submit the report of their Italian law expert, Gianfranco Amendola. In his report, Professor Amendola renders an opinion on the extent to which the landfills at the Orzinuvi plant violated Italian law as of the closing dates of the 1988 Purchase Agreement and the 1989 Purchase Agreement. Professor Amendola concludes that these landfills may have been out of compliance with the following Italian regulations: (1) Articles 216 and 217 of the Consolidated Health Act of July 27, 1934; (2) Articles 674, 440, 452 [*51] and 635 of the Italian Penal Code ("Penal Code"); (3) Lombardy Regional Law no.

94 of June 7, 1980 ("LRL"); and (4) DPR no. 915 of September 10, 1982 ("DPR"). In response, Defendants offer the opinion of their Italian legal expert, Gian Luigi Tosato. Professor Tosato's report concludes that the Orzinuovi plant did not, at any time, violate the Italian regulations cited by Plaintiffs with respect to the landfills located at that facility.

a.Determinations of Italian Law

[HN13] *Federal Rule of Civil Procedure 44.1* controls determinations of foreign law in federal court. Rule 44.1 gives a district court wide latitude in resolving issues of foreign law: " [HN14] The court in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." *Fed. R Civ. P. 44.1.* [HN15] Because of this latitude, a court may reject even uncontradicted expert testimony and reach its own decisions on the basis of independent examination of foreign legal authorities. See *Curtis v. Beatrice Foods Co., 481 F Supp 1275, 1285* **[*52]** (S.D.N.Y.), aff'd., *633 F.2d 203 (2d Cir 1980)* Moreover, [HN16] disagreement among legal experts on content, applicability, or interpretation of foreign law, as here, does not create genuine issues of material fact for summary judgment purposes. See *Banco de Credito Indus., S.A v. Tesoreria General, 990 F.2d 827, 838 (5th Cir.1993),* see also *Bassis v. Universal Line, S.A., 436 F.2d 64, 68 (2d Cir. 1970); Kashfi v. Phibro-Salomon, Inc , 628 F Supp 727, 737 (S D.N Y. 1986)*

Each side submitted a report by an expert in Italian environmental law to support its position and the parties provided the Court with English translations of relevant Italian law. Based on the foregoing guidelines, the Court intends to determine whether the landfills violated applicable Italian law as of the closing dates of the agreements by consulting the expert opinions and by conducting independent analysis of Italian regulations and authorities.

b. Consolidated Health Act of July 27, 1934

First, Professor Amendola concludes that the presence of landfills at the Orzinuovi plant violated articles 216 and 217 of the Consolidated Health **[*53]** Act of July 27, 1934 ("CHA"), which, although passed during the Fascist era, is apparently still in effect. Article 216 classifies manufacturing facilities into two categories, i.e., the first category and the second category. See Declaration of Massimo Coccia ("Coccia Decl."), Tab 12 (English translation of article 216). For purposes of this dispute, the experts agree that manufacturing plants that use or produce asbestos, like the Orzinuovi plant, fall within the first category. See Pls.' Ex. U, Amendola Rpt., p. 9; Pls.' Ex. W, Tosato Rpt., p. 6. Article 216 imposes two requirements on an operator of a manufacturing plant within the first category, namely, a notice requirement and a location requirement. Under article 216's notice requirement, plant officials must give written notice to the Mayor prior to the commencement of operations at the facility. See Coccia Decl., Tab 12. With respect to this requirement, on January 23, 1970, based upon an application filed by Frendo officials, the Mayor of Orzinuovi granted authority to construct and operate the Orzinuovi plant. See Roberts Aff. P 18; Ex. Q. In light of this, the Court finds that this application satisfies **[*54]** the notice requirement under article 216 of the CHA.

Article 216's location requirement provides that a manufacturing facility must be located in the countryside and removed from any housing, or, if located in an inhabited area, the facility must not create a public health risk. See Coccia Decl., Tab 12. With regard to this requirement, the Court observes that, given the evidence in this case, including pictures of the Orzinuovi plant, the facility appears to be situated in an uninhabited area, which means that article 216 imposes no further obligation on the operator of this facility. See, e.g., Pls.' Summary Judgmt. Br., Ex. A. Moreover, Plaintiffs fail to point to evidence that suggests otherwise. But even assuming that the Orzinuovi plant is located within an inhabited area, the facility was not out of compliance with the CHA. This is true on account of the pronouncement in the Mayor's January 23, 1993 order, issued pursuant to the CHA, stating that the Orzinuovi plant posed no public health risk. n11 Other factors lend support to this conclusion, including the opinion of Plaintiffs' own environmental consultant, who advised Plaintiffs' lawyers that any pollution caused **[*55]** by the landfills appeared to be contained within the plant and that the conditions in the surrounding area were acceptable. See Defs.' Ex. 52, p. 5.

> n11 For this reason, article 217 of the CHA was not violated either, since the Mayor has authority to act under this article only when operation of a given facility creates a specific danger for public health. See Pls.' Ex. W, Tosato Rpt., p. 7.

Based on the foregoing, the Court finds that operation of the Orzinuovi plant was not in violation of the CHA during the relevant time periods. Apart from this, and assuming arguendo that the Orzinuovi plant was in violation of the CHA, the Court notes that any such non-compliance would not have had a material and

adverse affect on Frendo's business (finances or operations), and thus, under the terms of the 1989 Purchase Agreement, no breach of warranty would have occurred. This is so given that operating a facility in violation of the CHA carries a maximum fine of only $ 250. See Coccia Decl., Tab 12 ("Any [*56] offence is subject to a penalty ranging from [$ 25 to $ 250]"); see also Pls.' Ex. W, Tosato Rpt., p. 6. In fact, Plaintiffs' own Italian lawyers opined as much in a May 1991 memorandum regarding the legality of the landfills, advising: "the negligible amount of sanctions provided in that article [of the CHA], as well as the fact that the obligation to notify is practically never observed by Italian enterprises (without any reaction by the authorities) make the risks deriving from this violation quite low." Defs.' Ex. 52, p. 13. Furthermore, based on its language, the 1988 Purchase Agreement limits recovery for any alleged violation of applicable environmental law to the extent available under the given statutory provision - i.e , $ 25 to $ 250 in the case of a CHA violation. See First Am. Compl.; Ex. H, § 12(b)

Based on the record in this case, the Court concludes that operation of the Orzinuovi plant was not in violation of the CHA at the time of the closings. In any event, given that the sanction for a violation of this statute carries only a fine ranging from $ 25 to $ 250, the Court notes that such a violation would not have constituted a material adverse situation [*57] as required under the 1989 Purchase Agreement.

c. Italian Penal Code Violations

1. Article 674

Next, Professor Amendola concludes that the presence of the landfills at the Orzinuovi plant violated [HN17] article 674 of the Italian Penal Code. Article 674, entitled "Dangerous Throwing of Things," punishes "whoever throws or pours in a place of public transit or in a private place of public or of other persons' use things that may offend, dirty or annoy other people " Coccia Decl., Tab 16 (English translation of article 674); see also Pls.' Ex. W, Tosato Rpt., p. 10. Because article 674, by its terms, applies only if the so-called "dangerous throwing" occurred in a place of public passage (which was not so here), this penal provision is inapposite. Interestingly, Plaintiffs' own Italian lawyers reached a similar conclusion back in May of 1991 in advising that: "it does not seem that any violation of article 674 may be alleged This article applies only if the deteriorating substance or matter is poured or thrown in a place of public thoroughfare or in a private place used jointly and the PAR report indicated pollution effects only within the Frendo area." Defs.' Ex. [*58] 52, p. 15. Even Professor Amendola tacitly admits as much in his expert report, opining: "the broad wording of [article 674] as to the places where it applies makes the provision applicable to almost any place, except for those places where there is exclusive use by the party disposing of the waste." Pls.' Ex. U, Amendola Rpt., p. 12 (emphasis supplied). The situation in this case presents the quintessential exception because the landfills were located in the backyard area of the Orzinuovi plant far removed from the public. Notwithstanding this, without any citation of legal authority, Professor Amendola advances the position that: "the crime is committed not only when the offence, the dirtying or the nuisance results from direct throwing or discharging, but also when such effect occurs indirectly, e.g. due to the place where the waste was disposed of, as in the case of contamination of underground aquifers." Id. at 12. The Professor fails to cite any evidence indicating that contamination of the water supply occurred here. Besides a lack of legal and factual support, his argument fails in light of the conclusion in the PAR report n12 that "the water quality is acceptable" [*59] and on account of the September 8, 1993 statement by the Province in its official chronology that the analyses done on September 7, 1992 by the Local Health Units show no contamination of the water inside the Orzinuovi plant. See Pls.' Ex. W, Tosato Rpt., p. 9.

n12 The "PAR report" refers to the report prepared by PAR Srl, the consulting firm hired by Rutgers to conduct environmental inspections at the Orzinuovi plant. See Defs.' Ex. 52, p. 3.

Based on the record in this case, the Court concludes that Frendo was not in violation of article 674 of the Italian Penal Code during the relevant time periods. n13

n13 The maximum punishment for violation of article 674 is one month imprisonment or a $ 235 fine. See Pls.' Ex. W, Tosato Rpt., p. 10. The Court therefore makes the same observation with respect to article 674 as it did with respect to article 216 of the CHA, namely, that any violation of either article would not have had a material and adverse affect on Frendo's business (finances or operations), and thus, under the terms of the 1989 Purchase Agreement, no breach of warranty would have resulted.

[*60]

2. Articles 440 and 452

Professor Amendola also concludes that the presence of landfills at the Orzinuovi plant violated articles 440 and 452 of the Penal Code as a result of the contamination of the aquifers. [HN18] Article 440, read in conjunction with article 452, relates to the negligent "adulteration or counterfeiting of edibles" and "punishes whomever corrupts water or food designated for consumption in a way that is dangerous for public health." Pls.' Ex. W, Tosato Rpt., p. 11; see also Coccia Decl., Tabs 17, 18 (English translations of articles 440 and 452). For these provisions to apply here, Plaintiffs must prove that because of the Orzinuovi landfills an adulteration of water designated for drinking occurred to such a degree as to be dangerous for public health. See Pls.' Ex. W, Tosato Rpt., p. 11. Professor Amendola, however, fails to provide any factual basis to support his conclusion. As discussed in connection with Plaintiffs' article 674 claim, the record reflects that no contamination of drinking water was shown to have occurred as a result of the landfills. See Roberts Aff. P 3, Ex. B, p. 152. Trying to dodge this deficiency, Professor Amendola [*61] cites a Court of Cassation decision (Criminal Division, Decision no. 968, Oct. 24, 1991) for the proposition that adulteration of water, pursuant to articles 440 and 452, occurs based on the mere danger of adulteration, even if no actual damage occurs. See Pls.' Ex. U, Amendola Rpt., p. 12. Professor Amendola has misconstrued that decision, as it held that with respect to the crime of adulteration of water, the government need not prove actual damages, provided that there is adequate evidence to establish an actual adulteration of drinkable water and a danger to public health See Pls.' Ex. W, Tosato Rpt., p. 11.

Accordingly, based on the record in this case, the Court concludes that Frendo did not violate article 440 or 452 of the Penal Code.

3. Article 635

In his report, Professor Amendola further concludes that the presence of landfills at the Orzinuovi plant violated article 635 of the Penal Code (which makes it a crime to seriously damage property) due to contamination of the aquifers Professor Amendola points out that in construing this article, a Court of Cassation decision advised that: "the pollution of deep aquifers constituting public water resources [*62] available to anyone through the use of wells constitutes the crime of serious damaging of property in view of the public designation of the water." See Pls.' Ex. U, Amendola Rpt., p. 13. From this quotation, it seems clear that [HN19] for article 635 to apply in the public water-supply context, proof of pollution must exist. Because article 635 requires proof of contamination of water (i.e., "deep aquifers"), which is not present in this case, the Court concludes that Frendo did not violate article 635 of the Penal Code based on the evidence in this case.

d. Lombardy Regional Law

In 1980, the Lombardy Region enacted Regional Law no. 94 of June 7, 1980 (the "LRL") to provide a regulatory scheme for waste disposal within the Region. See Pls.' Ex. U, Amendola Rpt., p. 13; Pls.' Ex. W, Tosato Rpt., p. 12. Professor Amendola alleges that waste disposal procedures at the Orzinuovi plant conflicted with provisions of the LRL as of its entry into force and all times thereafter. See Pls.' Ex. U, Amendola Rpt., p. 13. In making his argument, the Professor cobbles together a compendium of duties for waste producers by selectively picking provisions of the LRL and charges that [*63] the Orzinuovi plant operator did not adequately meet these obligations. See id. at 13-14. He summarizes the obligations as follows: "whomever had disposed in the past of industrial waste by dumping it (or burying it), was under a duty to notify the Region and to indicate the location of the closed dumps. If the person disposing of the waste was managing a waste disposal facility, it was obliged to apply for authorization to continue its activity, subject to the use of appropriate facilities and the adoption of all necessary precautions." Id. at 14. His report then lists various reasons why Frendo's actions failed to properly comply with the LRL. See id. at 15-18.

The fatal flaw in the Professor's argument, however, is that on April 30, 1984, regulatory authorities formally recognized the cessation of landfill usage at the Orzinuovi plant and Frendo's compliance with the LRL As discussed earlier, on October 1, 1980, regional officials received formal notification, pursuant to the LRL, from Frendo regarding waste disposal activities at the plant. After an April 19, 1984 on-site inspection of the plant, on April 30, 1984, the Province issued a decree verifying compliance [*64] with the LRL regulatory scheme.

Hobbled by this (i.e., the official confirmation of compliance with the LRL as of April 30, 1984), Professor Amendola (and Plaintiffs' environmental expert, Mr. Marcoaldi) challenges that edict by nit-picking the notification approach taken by Frendo and by charging that Frendo failed to disclose all of the landfills in the notification reports filed in accordance with the LRL. The fact remains that the Italian regulators charged with enforcement of the LRL had the opportunity - and availed themselves of it - to explore the bases for and quality of Frendo's reporting with respect to waste disposal activities at the plant by conducting an on-site inspection. This Court therefore refuses to belatedly second-guess the determinations of a foreign agency exercising its regulatory function. Accordingly, the Court

finds that Frendo was in full compliance with the LRL as of April 30, 1984, the date on which the Region issued its official pronouncement. Moreover, because of the lack of a material issue of fact as to post-inspection dumping, the Court concludes that the Orzinuovi plant operator was in full compliance with the LRL as of the closing dates of [*65] the 1988 Purchase Agreement and the 1989 Purchase Agreement.

e.(Presidential Decree) no. 915 of September 10, 1982

[HN20] The DPR (Presidential Decree) no. 915 of September 10, 1982 (the "DPR") represents the first national statute governing, among other things, toxic and dangerous waste disposal in Italy. See Pls. Ex. U, Amendola Rpt., p. 18; Pls.' Ex. W, Tosato Rpt., p. 17. The DPR requires producers of special waste, including toxic and dangerous waste, to obtain authorization for the operation of any landfill. See Pls. Ex. U, Amendola Rpt , p. 18. Professor Amendola argues that by virtue of the DPR, Frendo had a statutory obligation to remove landfills closed prior to the effective date of the statute. This construction of the DPR, however, conflicts with case law construing the statute and with the prohibition against retroactive rules. See Pls.' Ex. W, Tosato Rpt., pp. 18-21.

Based on the language of the statute and the ex post facto principle, this regulatory scheme imposes no retroactive obligations with respect to landfills that ceased operation prior to the effective date of the DPR. See id. at 18. The DPR was approved on September 10, 1982, but [*66] according to Italian authorities, this statute only became effective on September 13, 1984, the publication date of the resolution called for under the DPR. See id. at 23 ("It is clear that until September 13, 1984, date of publication of the resolution named by Article 4, all the administrative and penal rules on the disposal of toxic and dangerous waste were consequently not applicable (quoting Pretura Bassano del Grappa, decision of Nov. 15, 1985)). What is more, the Province of Brescia's official chronology confirms that at the time the DPR went into effect, Frendo had permanently closed the landfills. See Roberts Aff. P 3, Ex. H, p. 3. Additionally, back in May of 1991, Plaintiffs counsel, in connection with the DPR, concluded that: "compliance with this law depends upon the actual behavior of Frendo after April 1984, i.e. after the inspection of the site made by the province of Brescia as a consequence of Frendo's decision to abandon their application for authorization." Defs.' Exs., Tab 52.

Consequently, because the evidence in this case indicates that Frendo permanently closed the landfills at the Orzinuivi site by April 1984, prior to the DPR's effective date, September 13, 1984, the [*67] Court concludes that Frendo was not in violation of the DPR as of the closing date of either the 1988 Purchase Agreement or the 1989 Purchase Agreement, given the lack of evidence of post-inspection dumping.

Based on the foregoing, the Court finds as a matter of law that Plaintiff cannot establish Frendo's non-compliance with applicable environmental law or statutory liability on account of the landfills as of the closing date of the 1988 Purchase Agreement (or as of the closing date of the 1989 Purchase Agreement), nor can Plaintiff establish that it suffered losses because of any non-compliance or because of a claim or allegation of non-compliance. Consequently, the Court grants defendant Whitman summary judgment as to count II of Plaintiffs' amended complaint.

Conclusion

For the reasons set forth above, the Court grants Defendants' motion for summary judgment and denies Plaintiffs' motion for summary judgment. The Court denies as moot all other pending motions. The Court orders this case closed and directs the Clerk of Court to remove it from the Court's active docket.

SO ORDERED.

Dated: New York, New York

June 3, 2002

JOHN F. KEENAN

United States District [*68] Judge

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